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American Judicature Society

To Promote the Efficient Administration of Justice

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We regard the courts as a business institution to give the people seeking their aid the rights which facts entitle them to, and that with a minimum of time and money. We are a poor and busy people. We cannot afford to waste either time or money. —*William Renwick Riddell,*
Supreme Court of Ontario.

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To Promote the Efficient Administration of Justice

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Consolidate Chicago Courts

Illinois' Draft Constitution Makes One Court of Seven—People May Adopt Plan for Appointment of Metropolitan Judges—Supreme Court Given Rule-Making and Administrative Power

On December 12, 1922, Illinois voters will adopt or reject the first draft constitution submitted in over fifty years. The work of the convention was begun in January, 1920, and was completed on third reading June 28, 1922. During this long period of gestation views concerning the judiciary article were markedly developed. The draft finally registers a more advanced position than has been taken in any other constitution.

The most important change made in the proposed constitution is the consolidation of all the courts of Cook County into a single Circuit Court of complete trial jurisdiction. This consolidated court will have seventy-one judges, each possessing equal and complete trial jurisdiction as to civil and criminal cases, after the terms of certain judges shall have expired, as explained below. Provision is made for the organization of this judicial staff in two general divisions, with departments and special branches in each division as may appear convenient. This part of the judiciary article is self-operative. The Supreme Court is made responsible for the satisfactory operation of this metropolitan court.

The courts thus merged by the constitution are: Circuit Court, Superior Court, Municipal Court of Chicago, Probate Court, Criminal Court, County Court, and the City Court of Chicago Heights. There are eighty judges in these courts but nine of them who, by appointment of the Supreme Court, are sitting in the Appellate Court of the First District at the time the new constitution takes effect, will become permanent justices of the new Appellate Court.

Until the end of their terms the thirty-six associate judges of the Municipal Court of Chicago will be "associate judges" of the consolidated court. They will possess as such all the jurisdiction which they have had with an extension of territory to embrace the County of Cook, and also jurisdiction in felony cases. The jurisdiction withheld from them will be in chancery, and in tort cases in which more than $1,000 are involved, and their successors in office will be judges of complete trial jurisdiction. They will not be eligible to appointment to the office of chief justice. Their salaries will be the same while associate judges that they received at the time of taking effect of the new constitution, which will be May 7, 1923.

The foregoing represents the compromise effected between the various judges involved in the consolidation. In 1920 a plan was promulgated which created a single metropolitan trial court in which the judges of the Municipal Court of Chicago were to be "assistant judges" to exercise such jurisdiction and perform such services as might be determined by administrative orders. This was construed by the judges so affected to mean that they would be required to give up the great volume of important contract litigation, the efficient handling of which under reformed procedure had helped to make a world-wide reputation for the Municipal Court, and would be given only the less dignified and onerous work. Inasmuch as the term "assistant judge" had no meaning in law there was no assurance that the degradation woulid stop even at this point.

The protests made by the Municipal Court judges, and voiced by Chief Justice Olson, caused the early abandonment of this plan. In 1921, on first reading, the Convention provided for two courts; the Circuit Court would consist of all the judges of the county except the Municipal Court judges, who would be blanketed into a District Court to possess complete

Possible and Needed Reforms in the Administration of Civil Justice in the Federal Courts[1]

By the Hon. William Howard Taft,
Chief Justice of the United States

I hope you feel in a proper state of mind this morning, in view of the roof under which you are gathered. I don't know any reason why the distinction was made by which Lord Shaw of Dunfermline should speak in a place where athletic contests had theretofore been had, and I should be assigned to this sacred structure. It was doubtless because they knew that Lord Shaw could be trusted anywhere. I am sorry that we have not had the benefit of this fine church auditorium for all the sessions. I feel in speaking here as if I were enjoying an undue privilege, as if it were denying to others the equal protection of the law, not to give them the same opportunity. However, I shall need your prayers and all your self-restraint to keep your attention to what I have to present to you this morning, because it is going to be dry to the point of satisfying the Anti-Saloon League.

For many years, the disposition of business in the Federal courts of first instance was prompt and satisfactory. This was because the business there was limited, and the force of judges sufficient to dispose of it; but of recent years the business has grown because of the tendency of Congress toward wider regulation of matters plainly within the federal power which it had not been thought wise theretofore to subject to Federal control. More than that, the general business of the country, and the consequent litigation growing out of it, has increased, so that even in fields always occupied by the Federal courts, the judicial force has proved inadequate. In this situation, the war came on, statutes were multiplied, and gave a special stimulus to Federal business. Since the war there has been a great increase of crimes of all kinds throughout the country. This within the federal jurisdiction has included depredations on interstate commerce, schemes to defraud in which are used facilities furnished by the general government.

Then under the inspiration of the war, traffic in intoxicating liquors was forbidden, and under the same inspiration the 18th Amendment was passed and the Volstead law was put upon the statute books. Prosecutions under this law alone have added to the business in the federal courts certainly ten per cent; while cases growing out of the income and other war taxation, out of war contracts and claims against the government, have made discouraging arrears in many congested centers. The criminal business has usually been first attacked, and the effort to dispose of it has in many jurisdictions completely stopped the work on the civil side.

The Attorney General, properly as it seems to me, conceived that the first step to take was the creation of new judgeships. A bill was introduced in both Houses for the addition of 18 district judges to the judicial force, two for each circuit, who were not to be assigned to any district, but were to be subject to call to any district in the circuit in which they were appointed, to assist the existing district judges. In addition, these judges and the existing district judges were made subject to assignment from one circuit to another where the business required it. The suggestion of a flying squadron of judges did not meet with approval in the House of Representatives, and the Judiciary Committee of that body preferred to add local district judges for the districts where the congestion was most apparent.

Accordingly a bill was put through which made the judges in twenty-one dis-

1. An address delivered at the 1922 meeting of the American Bar Association.

tricts. The bill when it reached the Senate was modified somewhat. The bill went to conference, and a bill which provides for twenty-four new district judges and one circuit judge in the Fourth Circuit has been reported to both houses. It is opposed, and will doubtless lead to discussion; but in view of the previous votes in the two Houses, it seems likely that the bill will pass before the close of this Congress.[2]

Judicial Council Provided

The bill contains a very important provision, which it seems to me will make for expedition and efficiency. While the districts which receive new judges are those in which additions to the judicial force are most needed, there are arrears in other districts and the delays and defeats of justice are not confined to the normal jurisdiction of the twenty-four new judges. The new bill authorizes a judicial council of ten judges, consisting of the Chief Justice and the senior associate judge of each circuit, which is to meet in Washington the last Monday in September, to consider reports from each district judge with a description of the character of the arrears, and a recommendation as to the extra judicial force needed in his district. The conference thus called is to consider at large plans for the ensuing year by which the district judges available for assignment may be best used. The senior circuit judge of each circuit is given authority to assign any district judge of one district to any other in his circuit, while the Chief Justice is given authority to assign any district judge in one circuit to a district in any other circuit, upon request of the senior circuit judge of the circuit to which the district judge is to be assigned, and the consent of the senior circuit judge of the circuit from which he is to be taken.

These provisions allow team work. They throw upon the council of judges, which is to meet annually, the responsibility of making the judicial force in the courts of first instance as effective as may be. They make possible the executive application of an available force to do a work which is distributed unevenly throughout the entire country. It ends the absurd condition, which has heretofore prevailed, under which each district judge has had to paddle his own canoe and has done as much business as he thought proper. Thus one judge has broken himself down in attempting to get through an impossible docket, and another has let the arrears grow in a calm philosophical contemplation of them as an inevitable necessity that need not cause him to lie awake nights. It may take some time to get this new machinery into working operation, but I feel confident that the change will vindicate itself. The application of the same executive principle to the disposition of legal business in the municipal courts of certain cities, and in the courts of some states, has worked well. Although the whole United States is a more difficult field in which to apply it, there would seem to be no reason why its more ambitious application should not prove useful.

A good many objections, I may state informally, have been made to that feature of the bill. It is thought that it imparts too much power to the council of judges, and especially to the Chief Justice. Gentlemen have suggested that I would send dry judges to wet territory and wet judges to dry territory, oblivious of the fact that the Chief Justice has not the means of assigning them to any particular work in any district to which he may assign them, and that assignment to cases must necessarily be made by the local circuit judge who is in charge, and oblivious of the fact also that it is only by the consent of the two circuit judges that he can act. It nevertheless did serve to call out in the discussion references to Jeffreys, and other notorious judges in the history of our profession, that did not seem to be altogether complimentary to those to whom the references were applied.

The Appellate Courts

Second, I come to the appellate business in the Federal system. In the old days when business was light in all the

2. The bill has since passed both Houses.

Federal courts, the appeals and writs of error that were taken to the Supreme Courts were not sufficiently numerous to occupy the full time of the Supreme Court and the Justices were able to do a large amount of circuit work. Indeed, under the statute, until recent years, a circuit justice was required to visit each district in the circuit to which he was assigned, once in two years. As the appellate business grew, however, this rule became more honored in the breach than in the observance, and it has now been properly repealed. Its existence, however, showed that there was a time when its obligation was not unreasonable.

In 1891 a new intermediate court was created—the Circuit Court of Appeals, one to each circuit—and the circuit judges were ultimately increased so as to give three or more circuit judges for each court of appeals, except that of the Fourth circuit where there are only two. Appeals were allowed from the courts of first instance to the Circuit Court of Appeals, and, speaking generally, the judgments of the new court in cases depending on diverse citizenship, patent cases, admiralty cases and criminal cases, by this and subsequent legislation, were made final. This very radical change was made necessary by the arrears in the Supreme Court, which put the Court three years behind in the disposition of its cases. The new system worked a great reform, and the Court was able to catch and keep up with its business until within recent years. Now there is an interval of fifteen months between the time that a case is filed in the Court and its hearing. This is due not alone to the number of cases filed, but is due to the fact that with the increasing number of cases in which emergent public interest demands that a speedy disposition be had, many cases are taken out of their order and are advanced. Much of the time of the Court is consumed in the hearing of such cases and the regular docket is delayed.

The members of the Supreme Court have become so anxious to avoid another congestion like that of the decade before 1891, that they have deemed it proper themselves to prepare a new bill amending the jurisdiction of the Supreme Court and to urge its passage. It is now pending in both Houses of Congress. The act of 1891 introduced into the appellate system a discretionary jurisdiction of the Supreme Court over certain classes of cases. It proceeded on the theory that so far as the litigants were concerned, their rights were sufficiently protected by having one trial in a court of first instance, and one appeal to a court of appeal, and that an appeal to the Supreme Court of the United States should only be allowed in cases whose consideration would be in the public interest. Accordingly under existing law, appeals in diverse citizenship cases, in patent cases, in bankruptcy cases, in admiralty cases, and in criminal cases, can now reach the Supreme Court for review only when that Court shall, after consideration of the briefs and record, deem it in the public interest to grant the writ of certiorari. By the act of 1916, this discretionary power of the Court was extended and its obligatory jurisdiction reduced, as to review of state court judgments, so that now the only questions which can come by writ of error from a state court to the Supreme Court as a matter of right, are those in which the validity of a state statute or authority or of a federal statute or authority under the Constitution has been the subject of consideration by the state court, and has been sustained in the former, or denied in the latter case. All constitutional questions arising in the federal courts, that is, in the district courts or the Circuit Court of Appeals subject to review, may under existing law be brought to the Supreme Court as of right.

Supreme Court to Control Appeals

The new bill increases this discretionary appellate jurisdiction now vested in the Supreme Court so that no case of any kind can be taken from the Circuit Court of Appeals to the Supreme Court of the United States without application for a certiorari. Obligatory appeals from all other courts subordinate to the Supreme Court of the United States, from the Federal District Courts in a limited class of

cases and from the State courts are also abolished and only review by certiorari is provided. This includes the Court of Appeals of the District of Columbia and the Court of Claims, as well as the Territorial courts. Direct appeals from the District Courts to the Supreme Court in jurisdictional and constitutional questions are abolished and such questions are to reach the Supreme Court only through the Circuit Court of Appeals. These changes, it is thought, will give the Supreme Court such control over the business that it can catch up with its docket.

The objection urged to the bill is that it gives the Supreme Court too wide discretionary power in respect to granting appeals, and that a thorough examination of the cases on the applications for certiorari is impossible.

The bill has been recommended by the members of the Court only after a very full consideration of the subject. They are convinced that it is the best and safest method of avoiding arrears on their docket. It does not need an extended and close argument upon the merits of a question to enable the Court to decide whether it is important enough in a public sense to justify its consideration.

It is not necessary upon such an application for the Court to decide the issues which were considered below. That is not what the certiorari should turn on. The court can quickly acquire knowledge of the nature of the questions in the case from the briefs filed. To allow an oral argument on such applications would be largely to defeat the purpose of the bill. Every brief presented is carefully examined by each member of the court and every case is voted on. I just want to emphasize that, because I am a witness.

The class of cases most pressed upon the Court for the writ of certiorari are not the cases that involve serious constitutional questions. The motive of the litigants in most cases is merely to get another chance to have questions of importance to them, but not of importance to the public, passed upon by another court.

The discretionary power of the Supreme Court in allowing appeals in certain cases coming from state Supreme Courts and involving Federal constitutional questions is very little enlarged by the new bill. The change in the new bill on this point was made rather to clarify the meaning of the existing law than to enlarge the Court's discretion, and if objected to may well be stricken out. The general power of certiorari in such constitutional questions was conferred in the act of 1916 and has been exercised ever since. It was granted because Congress found that counsel were often astute in framing pleadings in state courts to create an unsubstantial issue of Federal constitutional law and so obtain an unwarranted writ of error to the Supreme Court. It was, therefore, thought wise not to permit a writ of error as of right in any cases except in those in which the plaintiff in error could show that a state court had held a state statute valid which was said to be in violation of the Federal Constitution, or a Federal statute invalid for the same reason; and to require in all other cases of alleged violation of Federal constitutional limitation that the Supreme Court should be given a preliminary opportunity on summary hearing to say whether the claim made presented a real question of doubtful constitutional law, or was, on its face, unworthy of serious consideration in view of settled principles. It was thought that a court very familiar with such questions by constant application of them could in a summary hearing separate wheat from chaff and promptly end litigation, the continuance of which must do great injustice to the successful party below, and, what is more important, clog the docket and delay the hearing of meritorious causes.

As already said, the new bill extends the certiorari jurisdiction of the Supreme Court to constitutional questions which are decided by the Federal Circuit Courts of Appeal. This is an amendment of existing law which will substantially reduce the docket of the Supreme Court and is justified and required for the same reasons as those which led to the act of 1916.

If in two Federal courts whose reason for being is to protect the rights of individuals against local prejudice in state courts, or against infraction of their Federal constitutional rights, a complainant is defeated, surely it is not conferring undue power upon the Supreme Court, whose members are engaged daily and for years in the consideration of such questions and their final adjudication, to provide a preliminary investigation into their seriousness and importance, before burdening that Court and its docket with a lengthy and formal hearing. The public and other litigants have rights in respect of frivolous and unnecessary consumption of the time of the Supreme Court which the use of the writ of certiorari seems to be the only practical method of preserving.

The Problem of Successive Appeals

Too many appeals impose an unfair burden on the poor litigant. Gentlemen, speed and despatch in business are essential to do justice.

Various methods have been adopted to limit appeals to courts of last resort. The costs have been made heavy. But that puts the privilege within the reach of the longer purse. Again classification by subject matter has been attempted, but this has not prevented clogging the docket with cases presenting no question of general interest or difficulty. In California, in Ohio, in Illinois, and in other states, the legislature has extended to the State Supreme Court a discretion, after preliminary and summary examination, to grant or deny appeals.

The failure of the Supreme Court to lay down definite rules for determining the cases in which certioraris should be granted has called for adverse comment. This is unjust. Certain general rules have been laid down. The writ is used to secure uniformity of decision in subordinate courts of appeal and to decide questions of general public importance which are not well settled. It is said that this is vague. But the very postulate upon which the discretion is granted is that definite rules for determining the appealable cases have not proved satisfactory, and that it is better to let the Supreme Court distinguish between questions of real public importance and those whose decision is only important to the litigants.

The members of the Court have recommended the new bill to Congress because they believe it to be the most effective way of speeding the disposition of causes before it and therefore speeding justice. The gain which the arrears have made upon the Court during this last year down to July 29th is represented by seventy cases, or eighteen per cent, and while the Court will make an effort to reduce its arrears, the prospect is, in view of the great additions to business in the subordinate courts, that the Court will fall further and further behind.

I may speak of a secondary reason why this bill should pass. The statutes defining the jurisdiction of the Supreme Court and of the Circuit courts of Appeal are not as clear as they should be. It is necessary to consult a number of them in order to find exactly what the law is, and I regret to say that without clarification by a revision, the law as to the jurisdiction of the Supreme Court, and of the Circuit Courts of Appeal, is more or less a trap, in which counsel are sometimes caught. This bill removes all technical penalties for mistaken appellate remedies.

Of course amendments could be made which would easily cut down the work of the Supreme Court, if Congress wishes to adopt a different function for the Federal courts than they now have. If it chooses to abolish the inferior federal courts or to take away their jurisdiction in diverse citizenship cases and in cases involving a federal question, as has been suggested by some, it would relieve business congestion in them and in the Supreme Court. The theory is advanced that a citizen of one state now encounters no prejudice in the trial of cases in the state courts of another state, and that the constitutional ground for the diverse citizenship of Federal Courts has ceased to operate. If the time has come to cut down the subject matter of Federal jurisdiction, it simplifies much the question of the burden of work in the federal courts,

but that has not been the tendency of late years. I venture to think that there may be a strong dissent from the view that danger of local prejudice in state courts against non-residents is at an end. Litigants from the eastern part of the country who are expected to invest their capital in the West or South, will hardly concede the proposition that their interests as creditors will be as sure of impartial judicial consideration in a western or southern state court as in a Federal court. The material question is not so much whether the justice administered is actually impartial and fair as it is whether it is thought to be so by those who are considering the wisdom of investing their capital in states where that capital is needed for the promotion of enterprises and industrial and commercial progress. No single element in our governmental system has done so much to secure capital for the legitimate development of enterprises throughout the West and South as the existence of Federal courts there, with a jurisdiction to hear diverse citizenship cases. But of course the taking away of fundamental jurisdiction from the Federal Courts is within the power of Congress, and it is not for me to discuss such a legislative policy. My suggestions are intended to meet the situation as it is, and to secure some method by which the litigation under existing law may be promptly and justly dispatched. The trial of criminal cases in the Federal Courts is not within the scope of this paper.

Would Abolish Dual System of Justice

An important improvement in the civil practice in the Federal Courts is one that in my judgment ought to have been made long ago. It is the abolition of two separate courts, one of equity and one of law, in the consideration of civil cases. It has been preserved in the Federal Court, doubtless out of respect for a distinction which is incorporated in the description of the judicial power granted to the Federal government in the Constitution of the United States. But many state courts have years ago abolished the distinction and properly have brought all litigation in their courts into one form of civil action. No right of a litigant to a trial by jury on any issue upon which he was entitled to the right of trial by jury at common law need be abolished by the change. This is shown by the every day practice in any state court that has a code of civil procedure. The same thing is true with reference to the many forms of equitable relief which were introduced by the Chancellor to avoid the inelasticity, the rigidity, inadequacy and injustice of common law rules and remedies. The intervention of a proceeding in equity to stay proceedings at common law and transfer the issues of a case to a hearing before the Chancellor was effective to prevent a jury trial at common law, and would not be any more so under a procedure in which the two systems of courts were abolished. Already under the Federal code, there is a statutory provision which has not yet been much considered by the courts, by which an equitable defense may be pleaded to a suit at law. If we may go so far, it is a little difficult to see why the distinction between the two courts may not be wholly abolished, and the constitutional right of trial by jury retained unaffected.

If the separation of equity and law for the purpose of administration is to be abolished in the Federal system, and they are to be worked out together in the same tribunal, then a new procedure must be adopted. Who shall do it? Shall Congress do it or merely authorize it to be done by rules of Court? Congress from the beginning of the government has committed to the Supreme Court the duty and power to make the rules in equity, the rules in admiralty, and the rules in bankruptcy. Moreover, this American Bar Association has for some years been pressing upon Congress the delegation of power to the Supreme Court to regulate by rule the procedure in suits at law. There would seem to be no reason why, where the more difficult work of uniting legal and equitable remedies in one procedure is to be done, the Supreme Court, or at least a Committee of Federal Judges, should not be authorized and directed to

do it. Of course the present statutes governing a separate administration of law and equity must be amended or revised by Congress, and certain general requirements be declared, but the main task of reconciling the two forms of procedure can be best effected by rules of Court.

England Solves Historic Problem

The same problem arose in the courts of England and has been most successfully solved. By the Judicature Act of 1873, Parliament vested in one tribunal, the Supreme Court of Judicature, the administration of law and equity in every cause coming before it. By subsequent acts, the divisions of that Court were reduced to three divisions: (1) the King's Bench; (2) Equity; (3) and Probate, Divorce and Admiralty, as they now are. They are all merely parts of the same court, but for convenience the suits are brought in those divisions respectively corresponding to the remedies sought. If it happens that what would have been equitable relief is sought in the King's Bench, it may be granted there, but it is more likely to be assigned to the Equity Division, and *vice versa.* Judges familiar with the equity practice are appointed to the Equity Division, and those familiar with the law side of the practice are sent to the King's Bench. Then there has grown up a separate branch of the High Court in which only commercial cases are heard, and to that Court judges familiar with the law merchant and commercial contracts and customs are assigned. There is the same division of the practice among the barristers under the influence of the older separation of law and equity administration, but the courts of the High Court are now all one court, with full power to give any kind of relief the nature of the case requires. Parliament gave to a commission of the judges and representatives of the Barristers and Solicitors, power to recommend rules of practice for this new system, and to the Courts to adopt them. The present procedure is the result of rules adopted in 1883, amended from time to time by the same authority as the experience with the existing rules showed the necessity. The rules and amendments are reported to Parliament for its rejection or amendment, but until that is forthcoming, they control the procedure.

It was my good fortune during three weeks of this summer to be able to attend the hearings of all the various branches of the courts of England in London.

I have head it questioned whether, in view of the report that was given in this country as to my activities that were not exactly judicial or professional, it was possible for me to absorb any knowledge with reference to the practice in the English courts. I think Lord Shaw has lent a little support to that view by certain remarks that I have heard him make. I am not disposed to say that in an ordinary case such evidence would not be convincing. But to men who have attended the meetings of the American Bar Association, and know what a single individual of digestive experience can do in the matter of functions for a week, a great deal will seem possible in three weeks.

I may stop to say that I am deeply grateful for the reception that was given me as Chief Justice by the Bench and the Bar of England, and for the truly brotherly spirit which they manifested. Of course, one cannot separate himself from the personal in such a manifestation. He knows it is not really personal, but representative, but he thanks God that he happens to be the personal representative to receive it. They opened their arms. Everything that they could do they did. It showed to me what I have always thought to be the case, that one of the strongest bonds between this country and Britain is the bond between professional men of the law and the judges who have to do with the administration of justice in both countries.

In connection with this general subject, the treasurer of the Association, Mr. Wadhams has asked me to read a letter, which I am sure you will be glad to hear.

The Royal Courts of Justice, London, July 21, 1922.

At the suggestion of Viscount Cave, who

enjoyed the hospitality of the American Bar Association the year before last, and with the approval of the Lord Chancellor, I am writing to you, tentatively, to ascertain whether I might send you a formal invitation to the American Bar Association to hold their annual meeting in 1924 in London. It will be a great honor and pleasure to the Bar of England if this could be arranged.

There are a number of matters, such as the time, the places of meeting, and facilities which would have to be considered, as well as minor details, but if you were to let me know that the invitation would be acceptable to the American Bar Association, it would be a pleasure to me to send you a formal invitation upon hearing from you.

Perhaps at the same time you would let me know the number who would be likely to come and the time during which the meetings would last. These matters, however, I leave for further consideration, and ask you to let me know as a preliminary whether my suggestion is one that the American Bar Association would entertain.

I feel sure that there are many of the Bench and Bar here who would be glad to join in offering a welcome to your Association, and who hope, as I do, that the plan may be found possible.

Believe me,

Yours very truly,

ERNEST M. POLLOCK.

Sir Ernest Pollock is the Attorney-General of England.

With respect to that suggestion, I may say that I was in attendance at the so-called Grand Night, at Gray's Inn, in London. The Lord Chancellor was there, the President of the Probate, Divorce, and Admiralty Division, Sir Henry Dukes, Mr. Justice Darling, Sir John Simon, and a number of others. The question of such a visit was discussed. They were all strongly in favor of it. And I can assure you that if the Association deemsit wise to accept this for the year 1924, those who go will never regret it or forget it. The Lord Chancellor, Viscount Birkenhead, I have been pressing to come to this country and attend the meeting of the American Bar Association next year. I am not sure how his engagements will be, but that he will be delighted to come, if he can come, I know. Certainly the American Bar Association would be delighted to receive him, not only as the highest judicial officer of Great Britain, but as a man of the greatest ability and the greatest charm, and a man that you would be glad to take into your bosom as a fellow judge and fellow member of the Bar.

Now, having proved to you that I gave sufficient attention to the practice in the Royal Courts, I am going to give you my conclusions.

I had looked into the description of the procedure which obtains in those courts as described in a very useful book prepared by Mr. Samuel Rosenbaum, of the Philadelphia Bar, entitled "The Rule-Making Authority in the English Supreme Court," and I was permitted to be present and note the practical operation of the rules. The history of their adoption is set out in great detail by Mr. Rosenbaum, and I shall not detain you with an attempt at even a *resume* of the growth of the system and the remarkable character of the reform which was effected through the rules in the administration of English justice. Nor am I competent to do so with accuracy of detail. I can only essay a most general description.

If one will read the contrast between the dreadful inadequacy of English Courts and the administration of English justice in 1837, when Victoria ascended the throne, and their efficiency and admirable work in 1887, when she celebrated her golden jubilee, as described by Lord Bowen, one of the great English Judges, in his Jubilee essay on the Administration of Law, he may well take courage as to what may be done with our system in the way of bettering it. Describing the result of the change of procedure by Rules of Court, Lord Bowen used these words:

"A complete body of rules—which possess the great merit of elasticity, and which (subject to the vote of Parliament) is altered from time to time by the judges to meet defects as they appear—governs the procedure of the Supreme Court and all its branches. In every cause, whatever its character, every possible relief can be given with or without pleadings, with or without a formal trial, with or without discovery of documents and interrogatories, as the nature of the case

prescribes—upon oral evidence or affidavits, as is most convenient. Every amendment can be made at all times and all stages in any record, pleading, or proceeding, that is requisite for the purpose of deciding the real matter in controversy. It may be asserted without fear of contradiction that it is not possible in the year 1887 for an honest litigant in Her Majesty's Supreme Court to be defeated by any mere technicality, any slip, any mistaken step in his litigation. The expenses of the law are still too heavy, and have not diminished *pari passu* with other abuses. But law has ceased to be a scientific game that may be won or lost by playing some particular move."

The justness of this summary is thus upheld by that great jurist, Mr. Dicey:

"Any critic who dispassionately weighs these sentences, notes their full meaning, and remembers that they are even more true in 1905 than in 1887, will particularly understand the immensity of the achievement performed by Bentham and his school in the amendment of procedure —that is, in giving reality to the legal rights of individuals."

The Judges Made Responsible

The means by which this reform was accomplished and the avowed object of the framers of the rules was to effect "a change in procedure which would enable the Court, at an early stage of the litigation, to obtain control over the suit and exercise a close supervision over the proceedings in the action." Thus could dilatory steps be eliminated, unnecessary discovery prevented, needed discovery promptly had, and the decks quickly cleared for the real nub of the case to be tried. It was first proposed to discard pleadings, but this was abandoned. Suit is begun by service of a writ of summons. Shortly after the appearance of the defendant, a summons for direction is issued to him, at the instance of the plaintiff, requiring him to appear before a Master or Judge to settle the future proceedings in the cause. In the King's Bench this work is done by Masters. In equity and commercial cases it is usually done by the Judge to whom the case is assigned. The Master or Judge makes an order as to the manner in which the cases shall be carried on and tried. In cases in which the original writ is endorsed with notice that the claim is for a fixed sum as upon a contract, a sale of goods, a note or otherwise, and the plaintiff files an affidavit that there is no defense, the Master may require the defendant to file an affidavit showing that he has a good defense and specifying it, before he may file an answer. If he files no such affidavit, summary judgment goes against him. In other cases, the Master or Judge makes an order, fixing time for pleadings and kind of trial, and no step is thereafter taken without application to the Master or Judge, so that the latter supervises all discovery sought, decides what is proper, and requires the parties to lay their cards face up upon the table and the real issue of fact and law is promptly made ready for the trial.

I sat with Sir T. Wills Chitty, the learned and most effective Head Master of the King's Bench, and saw the solicitors come in, sometimes barristers come before him to shape up the issues, the pleadings and the directions for trial. He knocked the heads of the parties together so that a clear issue between them was quickly reached.

Demurrers are abolished. An objection in point of law may be made either at or after the trial of the facts. Discovery may be had by a mere letter of inquiry from the solicitor of one party to the other, and any refusal is at once submitted to the Master or Judge. Should either party object to the orders of a Master, the question can be at once referred to the Judge who is to try the cause and passed on. The pleadings are very simple. They are a statement of claim and an answer. Great freedom is allowed as to joinder of actions and parties and in respect of setoffs and counterclaims. The pleadings are prepared on printed forms prepared for use according to the rules, with details written into the paragraphs. The nature of the claim is stated in a very brief way. A blank paragraph is left in the form for particulars as to the main facts and for

reference to documents relied on, copies of which are appended to the pleading. The main facts and the documents upon which each side relies to establish its case or defense are thus brought out by discovery, and all in a very short time. Admissions of important facts are elicited by each side from the other to save formal proof and its expense, on penalty of costs for refusal if the fact proves to be uncontested.

English Procedure Expeditious

The effect of the administration of justice under these rules can be shown in some degree by reference to the judicial statistics of England and Wales for 1919 in the disposition of cases in the High Court of Justice, King's Bench Division. The summonses issued in the King's Bench Division in a year amounted to 43,140. In 14,244 cases, judgments were entered for the plaintiff. In 386 cases, judgments were entered for the defendant. In 526 cases other judgments were entered than either for the plaintiff or the defendant, making a total of 15,136 judgments entered in the suits brought. This would leave undisposed of about 28,000 writs of summons issued. This sum represents the suits brought which were abandoned or which resulted in satisfaction of the claim without further proceeding beyond the issuing of the summons. Of the judgments rendered, over 9,000 were entered in default of appearance of the defendant; 756 by default other than in default of appearance. 2,684 judgments were entered as summary judgments under Order 14, because the defendant would not make the necessary affidavit to justify his securing leave to answer. One hundred and forty-one judgments were rendered after trial with a jury. Eight hundred and thirty-six judgments were rendered after trial without a jury. Thirty-five were rendered on the report of the official referee. Of the judgments for defendants, 55 were rendered after trial with a jury, and 309 after trial without a jury. This shows how thoroughly the preliminary steps to the preparing of the issue winnows out the cases and disposes of them without further clogging of the docket.

The speed with which this system disposes of the business was testified to by the New York State Laws Delays Commission twenty years ago. It reported to the Governor in 1903 that 23 judges of the High Court of Judicature in England actually tried twice the number of cases in a year that 41 judges in New York City tried in the same time, and that the difference was due to the operation of summons for directions and the summons for summary judgment. The Report was approved by the Association of the Bar of the City of New York, Judge Dillon then being Chairman of the Judiciary Committee of that body. It was sought to introduce this reform for New York City by act of the Legislature providing for fifteen Masters, but it is said to have been beaten by the influence of those who did not wish to abolish the referee patronage in the New York Courts.

The English system is adapted to the conditions prevailing in that country and has been built up on the traditions of the Bench and Bar, which do not have the same force here. Moreover, it is much more applicable to the disposition of the litigation of a great city like New York, Chicago or Philadelphia, as the New York Commission found it to be, than to our Federal Courts of first instance. In the first place, the territorial jurisdiction in England is a compact one, embracing only England and Wales, and in which there are 500 county courts, disposing, under the simplest procedure, of much of the business involving less than £300.[3] The branches of the High Court of Judicature to which these rules of procedure apply are centered in London, the judges live there, and while the assizes are held at various towns in England and in Wales, access to London is easy, and the natural result is that the important cases are generally either brought in London or ultimately reach there for their disposition. The division of the profession into barristers and solicitors, and the small num-

3. There are fifty-seven County Court judges in England and Wales.

ber of the active members of the Bar, as compared with our own, make it easy to form an atmosphere of accommodation on the part of the counsel toward the court and toward one another, which could hardly exist in the administration of justice in a Federal court covering all or half a state, and involving litigation in which the counsel who appear are engaged in that court in only a small part of their practice. The English barristers only know their clients through the briefs of the case which are handed them on which to conduct the cause in Court. Their fees are fixed in advance and are not contingent. They present the case in an impersonal way and are not tempted to use any other than proper means for the protection of their clients' interests. This renders much less common efforts at delay and the use of legal procedure to prevent the prompt rendition of justice. More than this, the system of costs in the English courts in which the defeated party is made to pay the expenses of the other side, including solicitors' and barristers' compensation, restrains counsel by the fear of penalties always imposed for useless proceedings.

Don't misunderstand me, that the costs would include a fee of 500 guineas. That is only when you employ one who has climbed to the top of the profession, and if you wish to afford that luxury, you will have to pay for that yourself whether you win or lose.

We could never adopt here the division of the Bar into solicitors and barristers or the English system of costs. But these differences should not prevent our using a great deal of what has proved effective in the English practice to simplify procedure and speed justice in our Federal Courts. The English precedent certainly demonstrates the advantage of having the procedure by Rules of Court, framed by those most familiar with the actual practice and its operation and most acute to eliminate its abuses and defects.

Permanent Commission on Courts Proposed

What I would suggest is that Congress provide for a commission, to be appointed by the President, of two Supreme Court Justices, two Circuit Judges, two District Judges, and three lawyers of prominence from a list recommended by the American Bar Association, to prepare and recommend to Congress amendments to the present statutes of practice and the judicial code, authorizing a unit administration of law and equity in one form of civil action. The Act should provide for a permanent commission similarly created, with power to prepare a system of rules of procedure for adoption by the Supreme Court.[4] Power to amend from time to time should also be given. The rules and their amendments, after approval by the Court, should be submitted to Congress for its action, but should become effective in six months, if Congress takes no action. In this way the procedure would be framed by those most familiar with it and by those whose duty it is to enforce it. The advantage of experiment in the laboratory of the Court would furnish valuable suggestions for bettering the system. The important feature of such a system is that needed action by the Commission and the Court will be promptly taken and the necessary delay in a Congress crowded with business may be avoided.

The reforms that I have been advocating involve some increases in the power of the judges of the Courts, either in the matter of the assignment of judges, in the matter of the enlargement of the certiorari power, or in the adoption of more comprehensive rules of procedure. I am well aware that they will be opposed solely on this ground, and that the objection is likely to win support because of this. It is said that judges are prone to amplify their powers,—that this is human nature, and therefore the conclusion is that their powers ought not to be amplified, however much good this may accomplish in the end. The answer to this is that if the power is abused, it is completely within the discretion—indeed within the duty—of the Legislature to take it away or modify it.

4. See resolution of American Bar Association, giving effect to this recommendation, following this address.

Dependence upon action of Congress to effect reform to remove delays and to bring about speed in the administration of justice has not brought the best results, and some different mode should be tried. The failures of justice in this country, especially in the state courts, have been more largely due to the withholding of power from judges over proceedings before them than to any other cause; and yet judges have to bear the brunt of the criticism which is so general as to the results of present court action. The judges should be given the power commensurate with their responsibility. Their capacity to reform matters should be tried to see whether better results may not be attained. Federal judges doubtless have their faults, but they are not chiefly responsible for the present defects in the administration of justice in the Federal Courts. Let Congress give them an opportunity to show what can be done by vesting in them sufficient discretion for the purpose.

A Federal Commission on Judicature

The address to the American Bar Association by Chief Justice Taft, published in this number, is in every way a notable contribution to current opinion on the administration of justice. It is no new thing for Mr. Taft to emphasize the need for better judicial organization and for simplified procedure, but it is significant that his efforts should be increased since he assumed the position highest in the nation's judiciary. It is significant that he construes the duties of the position to include administrative reform affecting the entire federal judicial system and also efforts to obtain needed legislation.

In attending the meetings of the American Bar Association and of the Conference of Bar Association Delegates, Mr. Justice Taft sets an example to judges in all courts. The latest address informs the organized Bar of the needs of the federal courts at a critical time. It may well prove the beginning of a great movement.

At the conclusion of the address the following resolution was read with the statement that it had received the unanimous approval of the Executive Committee; it was then unanimously voted by the members present:

WHEREAS, One of the gravest duties confronting the judges and lawyers of America is an administration of justice that will command the respect and veneration of the people:

RESOLVED,—First; that Congress be and it is hereby respectfully petitioned to provide by suitable statutory law for the creation of a Commission, the personnel of which shall be appointed by the President and to be composed of two Justices of the Supreme Court, two Circuit Judges, two District Judges and three members of the Bar of high standing and qualified by learning and experience.

Such Commission shall prepare and recommend to Congress amendments to the present statutes and the Judicial Code, authorizing a unit administration of law and equity in one form of civil action.

Second: That such act shall provide for a permanent Commission, created in similar manner, with power to prepare a system of rules of procedure for adoption by the Supreme Court, with power to amend from time to time.

Such rules and their amendments, after approval by the Supreme Court, shall be submitted to Congress for its action and shall become effective in six months after such submission, if Congress shall take no action thereon.

Model Judiciary Article

The model judiciary article was prepared at the instance of the National Municipal League to become part of the model state constitution which that organization decided to formulate at its meeting held in December, 1919. It was first published in this JOURNAL in February, 1920 (Vol. III, No. 5), and is now republished, with some changes, owing to the fact that the demand has exhausted the supply of that number.

As explained at some length in an editorial accompanying the first printing the National Municipal League has been so successful in fifteen years of campaigning for improved city charters that the reformation of American cities is now assured. A comparatively few cities remain without substantial improvements in organic law, but most of them show improvements and all of them indicate a trend toward genuine reform. The campaign has been so successful that the League has begun to devote its energies to state government and will in time settle the form of a model constitution. This follows the earlier work which centered about a model city charter.

The model judiciary article as first published was discussed at the 1920 and 1921 meetings of the National Municipal League. Aside from some slight amendment there was no serious disagreement except on the matter of selection of judges. On this point a majority of those voting were in favor of submitting a provision for the appointment of judges by the chief executive, subject to confirmation. There will doubtless be further discussion on this and other points. Meanwhile the editor takes the liberty of inserting on this point (Section 9) his own conception of this difficult matter.

The first draft dodged the question by providing for a continuation of such methods of selecting and retiring judges as may be in vogue. The reason for this off-hand treatment is that the big step now needed in judicial reform is administrative organization. This reform is quite feasible, but is likely to be prejudiced if not considered separately from the political features involved in selection and tenure. Unbending adherents to a particular form of selection appear unable, often, to give organization plans a fair consideration if their pet theories as to selection are infringed. There is also the probability that better methods of selecting judges will come along naturally after an efficiency organization is created and the judiciary shall have removed the suspicion which is now prevalent and is manifested by emphasis on the need for what is believed to be a close attachment of the judiciary to the public will.

INTRODUCTION

This judiciary article has been drafted to—

1. Effect a unification of the courts of a state.
2. Restore to the courts control of practice and procedure through the rule-making power.
3. Disturb existing procedure and offices as little as possible.
4. Exclude detailed provisions of a statutory nature.
5. Be as far as possible self-operative.
6. Be applicable with slight change to all but a few states.

Valid complaint of the courts is largely directed to the administrative side of the judicial function. In a final analysis it means that the courts do not employ businesslike methods for doing what is actually judicial business. The judicial system is unable to react to this body of criticism. Its product in the average state is the product of a very large and complex machine. It is composed of a large number of separate units with no sufficient means for co-ordinating their effort.

The judicial system of a state has a definite task to perform, that of administering justice in a myriad of forms, but it has no adequate means of informing it-

self of the precise nature of this task. The institution has no record of previous performance. It is, in fact, an extensive institution without a brain.

The inability of the institution to react to criticism led a long time ago to attempts to direct its efforts through legislation. The legislature, as the only agency through which action could be obtained, was resorted to for thousands of sections of law. This indirect method has not availed. We are as far now, as when we began, from achieving the desired end. The great body of statutory procedure has tied the hands of the judges. It has created numberless new substantive rights, each the subject of fresh litigation. It is a method which violates our doctrine of separation of powers.[1]

The judges have been trusted with the most delicate and difficult function of ascertaining the law and applying it to concrete situations, but the ordinary, every-day management of the courts' affairs has been taken from them.[2] The legislature assumed this unwonted function because the judges never possessed such organization as would enable them to exercise these necessary powers of administration.

Based upon an analysis of the situation thus roughly expressed there has grown up in recent years an idea of providing the judicial institution with the organs which it lacks; of simplifying its structure; of tying together its several parts; of enabling it to inventory its work and its resources so that the work can be done promptly and economically.

This is commonly called unification of the courts. The principal of controlling procedure through court-made rules is a necessary part of this idea.

We have gone a great way when we have discovered the great, pervasive, underlying cause for shortcomings, and have formulated a definite ideal of improvement. But it is still a difficult matter to express that ideal in legislative terms and to adapt it concretely to an extremely complicated situation. In recent years there have been a number of attempts to accomplish this, through amendments to constitutions, through acts of legislature, or through combinations of the two.[3] In most states no considerable advance can be made without changing the constitution. This does not imply that the new principle is in conflict with the spirit of any constitution; it is due merely to the unnecessary details which encumber constitutions and effectually block comprehensive legislative reform.

This judiciary article is concerned wholly with co-ordinating the various courts of a state. It conserves all that is useful of the old system; it provides the unified system with the means for its own control; it aims at an environment within which every judge can develop his latent powers. It recognizes the need for only three kinds of courts, namely: (1) one for appellate business; (2) one for trials of all kinds, and (3) one for the special convenience of each separate county.

The effect of the article is to consolidate every existing tribunal in one of these three main departments. It then provides for the management of the entire institution through a council of judges, which is composed of representatives of the three kinds of judges. Since every department of the unified court, and every section of the state, is represented in the Judicial Council, it follows that the Council has knowledge of the present working of every branch court throughout the State. And conversely, every portion of the State is in constant touch with the central management, because the local presiding justice is a member of the Judicial Council. This ties the institution together—giving it a working organization of the simplest type. With the provision for recording data of administration, and the plan for judges' meetings, the judicial body acquires a brain and a nervous system.

[1] Report of Special Committee to Suggest Remedies, etc. Proc. Am. Bar Ass'n, 1909, pp. 595-598.

[2] Board of Statutory Consolidation of the State of New York. Preliminary Report, 1912. Reprinted in Journal of the Am. Judicature Soc., Vol. I, p. 77.

[3] Journal of the Am. Judicature Soc., Vol. I, p. 15. No. 2, p. 3. No. 3, p. 68. No. 4, p. 101. Vol. II, No. 5, pp. 133 and 145.

The Judicial Council is provided with an executive officer known as the Chief Justice of the State. The office of Chief Justice is of sufficient importance to justify filling it by vote of all the electors.

The Judicial Council is empowered to make, alter and amend all rules of practice and procedure and all such existing rules are repealed as statutes but continued as the first rules of court. Thus the orderly evolution of procedure is permitted at the hands of an expert and responsible body. The Council will also control the work of all clerks and other ministerial officers through rules and orders. It will also through the heads of departments and divisions control the various calendars of cases and the assignment of judges to special calendars, so that there need never be in any branch a congested calendar while in some other branch there is an unemployed judge.

The matter of statistics of administration and meetings of judges are very important parts of the plan.[4] The data inform the court of its own doings; they form a foundation for all plans and policies. They stimulate judges to higher achievements. They inform the public of what the courts are doing. If the judges serve well the records show it. The statistics constitute the memory of the court and without memory there is no mind.

The meetings of judges quarterly in districts and annually as a whole are of first rate importance. They enable the judges to share their experience and advise one another. They broaden out the authority of management to all the judges and permit the least of them to exert an influence proportionate to his intrinsic worth.

Meetings are necessary for judges just as they are necessary for any other detached workers in a difficult field. Jurisprudence is not static. Its growth calls for the closest community of study and experiment. Our present method of pigeon-holing practically all of our judges prevents effectually all sense of mutual responsibility and mutual assistance and exchange of ideas and experience. It prevents *esprit de corps*. It limits the progress of judicial thought and action and brings the courts to a position comparing unfavorably with the progress made in other fields of intellectual effort.

If it be thought that the powers necessary to the successful administration of the courts are dangerous powers, the answer is that the statistics and the judicial meetings supply the needed checks. They make of the entire judicial institution a body which must disclose all its doings and measure up to honest and open public opinion. There is abundant experience to prove this in the history of certain American courts which have been organized with conspicuous powers and leadership and regularly utilize statistical reporting and meetings of judges.[5] Such courts know what the public and the legal profession think of their work. The people are given an opportunity to voice their complaints freely, sincerely and in confidence. While many complaints are based upon a misunderstanding, the opportunity to express them serves a necessary function in establishing the judges in the confidence of the people. The judges in meeting cannot ignore complaints, for they have too much self-interest. The meetings inevitably lead through interchange of views to the preponderance of the opinions of the more conscientious and ambitious judges, so that the standards of the leaders become the accepted standards of all.

The meetings and statistics make for standardized justice. This is something toward which we are slowly groping, first in the large cities, where chaotic conditions of judicial administration work such obvious evils, and eventually in the State at large, as the true unit of judicial administration. Standardized justice is a somewhat vague ideal, but we can shape conditions at least to permit of standardized methods of administration.

In conclusion, attention is invited to the fact that the unified system is very much simpler than the existing system of

[4]Journal of the Am. Jud. Soc., Vol. I, No. 5, p. 148.

[5]Vid. Reports of the Municipal Court of Chicago.

courts in any State. And yet it is effected with comparatively little change. It merely introduces certain factors which have been lacking in the equation, and which have been proved necessary to its solution. The new features have been tested under the most severe conditions of administering justice in American jurisdictions. They are the factors which must be introduced if we are ever to make substantial progress in this vitally important work.

Draft Judiciary Article

SECTION 1. **General Court of Justice Created.]** On and after January 1, 192.., the judicial power heretofore vested in the [here name all the courts of the State] shall be vested in the General Court of Justice, which shall have three departments to be known as the Supreme Court, the District Court, and the County Court.

The operation of this Article is postponed to permit of the election of a Chief Justice, who will organize the General Court by selecting certain judges to be members of the Judicial Council. The new regime will then begin with the same judges as before and the same body of procedural rules. There is no jolt whatever in making the change, which consists merely in a new and unified authority being constituted.

SECTION 2. **First Judges.]** The justices of the Supreme Court and the judges of the [here name all the courts of the state except justice of the peace courts] holding office on said first day of January, 192.., shall constitute the first judges of the General Court of Justice and shall continue to serve as such for the remainder of their respective terms and until their successors shall have qualified.

All the judges are consolidated in the state court, but justices of the peace are omitted. Their powers and duties are dealt with subsequently. (See Sec. 5.)

SECTION 3. **Justices of the Supreme Court.]** The justices of the Supreme Court shall become justices of the Supreme Court department of the General Court.

This draft is made directly applicable to the situation as it exists in a majority of the states. In these states there is but one appellate court, which is known as the Supreme Court. It is most convenient to retain the accustomed name. A future increase of appellate business will be taken care of through the power to sit in divisions conferred by Sec. 6.

A number of states have also intermediate appellate courts. The following substitute Sec. 3 is suggested to meet the situation in such a state:

> Sec. 3. The justices of the Supreme Court and the judges [justices] of the [here name the intermediate courts of appeals] shall become justices of the Supreme Court created by this Article for the remainder of their terms. The justices of the Supreme Court shall constitute the first division of the Supreme Court herein created and shall sit at the seat of government. The remaining justices shall be apportioned among one or more divisions to bear consecutive numbers beginning with number two, which divisions shall sit at places to be designated by the Judicial Council.

SECTION 4. **Judges of the District Court.]** The judges of the District Court [or Circuit or Superior Court, as the case may be] and the judges of the [here name any special municipal courts which have a considerable trial jurisdiction] shall become judges of the District [or Circuit, or Superior] Court.

As there are to be but two trial departments in the General Court, any existing special municipal courts will have to be classified either as parts of the District Court, or as parts of the County Court. The classification will be based upon the extent of jurisdiction previously conferred upon the municipal court in question. Most of these special courts have limited jurisdiction and will naturally fall into the County Court class. There is a presumption that in any county which has such a special municipal court there is too much work for a single county judge. The judge of the former municipal court will thus become an associate with the county judge, with like powers unless the Judicial Council selects one to supervise the activities of the other.

SECTION 5. **Judges of the County Courts.]** The judges of the County Courts [or Probate Courts, if they are the only courts of county jurisdiction] shall become judges of the County Court, and justices of the peace shall be attached as magistrates to the County Court branch of the County in which they reside.

In all counties having a population of 100,000 or more according to the . . . census of .... the County judge in office at the time this constitution shall take effect shall become a judge of the District Court and serve as such until the end of his term. In every such county the County Court shall be merged in the District Court and become an indivisible part thereof.

The Judicial Council shall have power to create a single County Court by a union of two counties where such union shall appear advantageous for the economical administration of justice, but no judge shall forfeit any part of the term to which he shall have been elected by reason of such union of counties.

Under rules to be made by the Judicial Council sessions of any County Court may be held at places other than the county seat.

There is much less need for justices of the peace than formerly, owing to the improved means of travel and communication afforded by trolley lines, automobiles, rural delivery of mail and telephones. Lay magistrates should continue only in the precise localities where they can be useful. They should be under the supervision of the County Judge.[6] Under proper rules a certain number of justices of the peace can be useful as assistants to the local judges, and the remainder should be relieved of office as vacancies arise. The County judge is made responsible for the administration of justice within the county up to a certain limit of jurisdiction, say $500 in civil actions, and offenses punishable with three months' imprisonment. He should hold court occasionally in the towns in his county, and should monopolize the conduct of jury trials.[7]

The provision for a union of counties will permit of economy in administering justice in sparsely settled counties and the selection of a higher type of judge who will devote all of his time to judicial work and receive a higher salary than could be paid by a single small county.

In counties having a population of 100,000 or more there is no excuse for maintaining an inferior court. Hence the merger.

SECTION 6. **Jurisdiction of Supreme Court.]** The Supreme Court shall have and exercise [here insert all the powers and jurisdiction which it may be desired to confer upon the state's highest tribunal]. The Supreme Court shall have power to sit in two or more divisions, when in its judgment this is necessary for the proper dispatch of business, and to make rules for the distribution of business between the divisions and for the hearing of certain cases by the full court.

With respect to the manner in which the Supreme Court will conduct its business this section is made broadly permissive. In all except a few less populous states it is necessary to have more than one division if the one-man opinion is to be avoided. Experience has clearly demonstrated that it is far better to have a

[6]Vid. Efficient Local Courts. Journal of the Am. Jud. Soc., Vol. III, p. 13.
[7]Bul. VII-A, Am. Judicature Soc., p. 56.

single court of appeal, however numerous, working in divisions, than a separate intermediate appellate court. These divisions may be of three or five, or any other convenient number, and there may be various plans for the distribution of appellate work among them to accomplish these two purposes: (1) to permit of a maximum output; and (2) to permit of a hearing in banc, or by the Supreme Court division when there is involved a question of constitutional interpretation, or a threatened conflict between the decisions of two co-ordinate divisions.[8] But it is far safer to leave the matter of divisions and distribution of business to the judges. Attempts to define these regulations arbitrarily are likely to result in embarrassment. There is no reason whatever for attempting to define them in the constitution. Judges entrusted with the great powers conferred upon such a court can be trusted to regulate the mechanics of operation.

In a state in which the alternate Sec. 3 is adopted it may be desired to supplement the foregoing Sec. 6 as follows:

The first division of the Supreme Court shall determine all questions involving the constitutionality of a law or ordinance and all causes certified to it by reason of a conflict of law arising from diverse decisions in other divisions of the Supreme Court.

SECTION 7. **Jurisdiction of District Court.**] The District Court shall have original jurisdiction in all cases civil and criminal, except where exclusive jurisdiction is by this constitution or by law conferred upon some other department or division of the General Court. It shall have such appellate jurisdiction as may be prescribed by general rules made by the Judicial Council, or by law.

Appellate jurisdiction is conferred upon the District Court because it may appear expedient to have a final review of certain of the smaller causes appealed from the County Court without taking them to the state Capitol. Appeals from the local courts present a difficult problem, one which has never been solved satisfactorily. It may be that the District Court can dispose of the lesser of these appeals, or all of them, and save the expense of going to the highest court. The section is so phrased as to permit of experiment.

SECTION 8. **County Court Jurisdiction.**] The County Court shall have original jurisdiction to try all causes at the present time within the jurisdiction of the County Court and Justices' Court, unless or until otherwise provided by law.

If the state be one which has no court of county-wide jurisdiction except the Probate Court, it will be necessary to insert in this section the extent of civil and criminal jurisdiction which can be successfully exercised in the average-sized county by a single judge. This may be assumed to be civil jurisdiction to $500 and criminal jurisdiction to include misdemeanors.

The plan in force with respect to probate jurisdiction should not be disturbed if it is giving satisfaction. Where probate proceedings are in the hands of capable judges it is simpler to permit an appeal direct to the highest court rather than to have an appeal to the *nisi prius* court with retrial. There is no need to refer specifically in the constitution to the manner in which probate jurisdiction will be exercised. This will be controlled by rules which will permit of adaptation to any plan which ultimately receives approval.

SECTION 9. **Selection and Tenure.**]

The greatest defect in judicial administration lies in the lack of co-ordination of the judicial system. In many states the time is ripe for unifying the system as an administrative machine. The political problems involved in selection and tenure create extremely divergent opinions. While in most states reform is taking the course of intended improvements in modes of nomination and election there is a growing body of opinion that success is only to be won through a return to the original American plan of appointment of judges by the chief executive of the state.

The plan submitted in this draft article for the unification of the courts and judges is suited to any form of selection. It is of the utmost importance that conflicts of opinion as to the best, or most expedient, modes of selecting judges should not overshadow the supreme importance of better organization.

[8]Bul. VII-A, Am. Judicature Soc., p. 13.

It is suggested that in many states the people are not prepared to relinquish the popular election of judges and that they lack confidence in their governors to exercise the power of appointment. Also that judges elected in less populous districts are generally giving satisfaction, but that in large cities or populous counties the elective plan has broken down and must be supplanted by some more responsible system.

In such a state the plan adopted by the Illinois Constitutional convention (1922) offers a valuable and encouraging example. It is provided that after a period of five years the voters of Cook County may initiate a referendum vote on the question of having judges in that county appointed by the governor, from a small list to be made up by the Supreme Court. The terms of judges so appointed shall be for the usual period of six years and at the end of each term the "electors of the county shall be given an opportunity at an election to express their disapproval of such judge." A judge so disapproved shall be ineligible for appointment for six years. This plan provides for a choice from a list expertly prepared, and gives the electors entire power to retire a judge after a fair trial. It is expected to result in continued service on the part of all judges who hold public confidence, saving them from the pitfalls of elections likely to turn on political or partisan issues and from the need of competing with a field of ambitious aspirants whose qualifications are not ascertainable by the voters.

It is suggested that in states in which comparable traditions and conditions exist it would be best to continue methods of selection which are affording satisfaction and that in all very populous counties appointment be by the presiding justice of the District Court for that county (district), for the accustomed term and subject to the will of the voters as to retirement or continuation for an additional term. Such a plan fulfills the principle of selection by an expert authority who is responsible for the due administration of justice. The head of a great city court would be more interested than any other person in selecting qualified judges and would be in a position to choose judges of exceptional juristic talent.

SECTION 10. **Election of Chief Justice.]** At the general election to be held on the ..... day of ....., 192.., a Chief Justice of the General court shall be elected for a term of ..... years in the same manner provided at that time for the nomination and election of justices of the Supreme Court. When a vacancy occurs in the office of Chief Justice a majority of the Supreme Court justices shall choose one among their number to act as his successor for the remainder of the unexpired term (or, until the next general election). The salary of the Chief Justice shall be $..... and shall not be [increased or] diminished during his term of office.

If justices of the Supreme Court have been elected by districts the foregoing text should be altered to provide for the election of the Chief Justice in the manner provided for the office of Governor. The duties of the Chief Justice are largely executive in nature and this may be cited as a reason for making his term shorter than that of other judges of the Court of Appeal. No recommendation is made. If a relatively long term is provided it would be safer to omit the restriction on increasing his salary during his term of office. If the term is relatively short the limitation may be included on the theory that it will prevent him from lobbying for an increase of salary.

SECTION 11. **Powers and Duties of Chief Justice.]** The Chief Justice shall be an additional justice of the Supreme Court and Presiding Justice thereof. He may sit in any division thereof. He shall preside over meetings of the Judicial Council and shall be executive head of the General Court of Justice, exercising such powers as are herein expressed or may be hereafter conferred by rules, not in conflict herewith, made by the Judicial Council. It shall be the duty of the Chief Justice to organize the General Court. The Chief Justice shall cause to be published an annual report which shall include statistics regarding the business done by each department of the General Court, and the state of the dockets at the close of the year.

The Chief Justice will organize the General Court before the date set for its operation by designating certain judges to make up the Judicial Council. This is all that is required. With the Judicial Council constituted the new system can go into operation without a hitch, and with almost no change affecting the duties and powers of the various judges. Rules of administration will need to be made in certain fields at an early date, and others from time to time under the general administration and rule-making powers conferred upon the Judicial Council. The Chief Justice will see that these rules are being properly observed.

SECTION 12. **Districts Created.**] Subject to alteration by the Judicial Council or by law, the state shall be divided into the following districts, namely:

First District: The First District shall comprise the following Counties, to-wit: [and so forth]

The number of districts will depend upon the total number of District Court judges and the area of the state. There should be from five to ten judges in a district. Uniformity is by no means essential. A district comprising a large city may have more judges than the average district so as to permit of keeping the districts in thinly populated portions of the state from being too extensive in area for convenient administration. There may be with advantage considerable irregularity in the shapes of districts in order to adapt them to existing means for travel.

SECTION 13. **Assignment to Districts — Presiding Justices.**] The District Court judges shall be assigned by the Chief Justice to the several districts. As nearly as may be each judge shall be assigned to a district containing all or a part of the district [or circuit] where he served regularly as a judge prior to the adoption of this Article; but every such judge shall be eligible to sit under temporary assignment in any other district. Each district shall have a Presiding Justice who shall be appointed by the Chief Justice from among the judges over whom he is to preside, to serve as such until the end of the term of the Chief Justice, or until his retirement, or his removal as Presiding Justice by the Judicial Council. The Presiding Justice in each district shall have control over the calendars in the District and County Courts in his district and the assignment of judges subject to rules to be made by the Judicial Council.

The first sentence protects every sitting judge in respect to his place of residence. There is to be as little disturbance of the former system as possible. But in time the principle of the specialist judge will be developed as far as experience warrants. Certain judges will unavoidably possess experience and attributes making them of special value in the more difficult causes in such divergent fields of law as real estate, damage suits, criminal trials, and so forth. Judges should be encouraged reasonably to develop specialization and the litigants of every county should have their services available as occasion requires, under the assignment system which is provided.

The duty of the Chief Justice is to see that nothing stands in the way of efficient service on the part of all the judges of the entire state. His powers derive largely from his selection of the Presiding Justices who constitute the Judicial Council. By making such appointment for a term equal to that of the Chief Justice, the Presiding Justices are made independent agents. But should one of them so conduct himself as to incur the disapproval of a majority of his colleagues on the Judicial Council, he may be removed as Presiding Justice. This plan affords a practical equilibrium of powers between the Chief Justice and the General Court.

SECTION 14. **The Judicial Council.**] There shall be a Judicial Council to consist of the Chief Justice, the Presiding Justices of the several districts, and two [or one] justices of the Supreme Court and two County Court judges to be assigned for one year by the Chief Justice. The Judicial Council shall meet at least once in each quarter at a time and place to be designated by the Chief Justice.

There should be representation of the Court of Appeal and the County Court in the Judicial Council. Whether one or two are assigned from each of these departments is not a serious consideration. If the plan for one year assignments by the Chief Justice is deemed to confer too much power on the head of the General Court, by enabling him to alter the make-up of a Judicial Council which is opposed to his policies of administration, the number of such specially assigned members may be kept at one from each of these two departments; or the assignments may be for three or four years.

SECTION 15. **Powers of the Judicial Council.]** The Judicial Council, in addition to other powers herein conferred upon it, or hereafter conferred by law, shall have power to make, alter and amend all rules relating to pleading, practice and procedure in the General Court, and to prescribe generally by rules of Court the duties and jurisdictions of masters and magistrates, also to make all rules and regulations respecting the duties and the business of the Clerk of the General Court and his subordinates, and all ministerial officers of the General Court and all its departments, divisions and branches. The Judicial Council may reduce the number of justices of the peace in any county as vacancies occur.

The Judicial Council may by rule provide for the assignment of any District Court judge to service in the Supreme Court to take the place of any Supreme Court justice during his illness or disability or when any such place may become vacant, or when additional justices of the Supreme Court are needed to prevent delay in the work of the Court. In any division to which a District Court judge is so attached there shall be a majority of Supreme Court justices.

This is the only section in which mention is made of masters. It is presumed that any state adopting this article will continue its policy with respect to the office of master for a time at least. County Court judges could be made *ex officio* masters without salaries by rule of court. In most localities this would fill the need. If a salaried office is to be created it will probably be preferred to leave it to an act of legislature.

Under this section the justices of the peace are made amenable to such supervision as the Judicial Council, by general rule, may establish. The number of lay magistrates is left in the discretion of the Judicial Council and no immediate change is made. Elimination of expense and inexpertness can be accomplished in time through a series of experiments. Meanwhile the justices are brought under the superintendence of the County Court.

SECTION 16. **First Rules of Court.]** The rules in force at the time the General Court shall be established regulating pleading, practice and procedure in the courts consolidated by this Article, which are not inconsistent herewith, whether the same be effective by reason of any or all acts of the legislature, or otherwise, are hereby repealed as statutes and are constituted and declared to be operative as the first rules of court for the appropriate departments of the General Court, but subject to the power of the Judicial Council to make, alter and amend such rules.

At any time after four years from the time of the taking effect of this constitution the General Assembly may, by law, alter or amend any rule so made by the Judicial Council.

For four years the Council will have exclusive power to regulate procedure It should, during this period, demonstrate its capacity to such a degree that subsequent interference by the legislature will not be a serious menace.

The foregoing section vests the power to make, alter and amend all rules of practice and procedure exclusively in the General Court. This is in line with the present trend of thought. If it is considered that this makes too great a limita-

tion upon the power of the legislature the change of text should result in protecting the court in its exclusive power and responsibility for a period of at least five years, in order to give the judges a reasonable opportunity to exercise the rule-making power without interference.

SECTION 17. **Clerk of the General Court.**] There shall be selected, by nomination of the Chief Justice and confirmation of the Judicial Council, a Clerk of the General Court of Justice, whose duties shall be prescribed by the Judicial Council. The Supreme Court reporter and clerks of all existing courts at the time of the establishment of the General Court shall continue in office until their terms expire or are terminated according to law, and shall be subject to the general supervision of the Clerk of the General Court. As vacancies occur in the offices of such clerks and Supreme Court reporter the places shall be filled in the manner provided above for the selection of the Clerks of the General Court, and the persons so selected shall hold for such terms and receive such salaries as the Judicial Council shall direct.

A Chief Clerk is required because it is through the clerk's office that a good share of the co-ordination of the courts is to be secured. The responsibility for economical and expert functioning devolves upon the Chief Justice, and the head of the clerk system becomes his right hand in administration. It follows that the Clerk should be appointed by the Chief Justice and should hold at the pleasure of the Judicial Council. This does not imply frequent changes; it means, on the contrary, that the Clerk will become the willing agent of the court management.

The clerks of the *nisi prius* courts become virtually deputies of the Chief Clerk. In some states the county clerks are *ex officio* clerks of the *nisi prius* courts. It is presumed that under this section their successors from time to time will be named by the Judicial Council as local clerks. But in the more populous counties, where a differentiation is needed, and nothing is to be saved by the old plan, the Council can retain indefinitely as clerk one whose term as county clerk has expired. In the least populous counties one clerk can serve both as District Court clerk and County Court clerk.[9] And in all other counties the County Court clerk can be designated by rules to assist the District Court clerk as deputy.

The provision to the effect that all clerks shall "hold for such terms as the Judicial Council shall direct" permits of long tenure and takes the office out of politics. Expert clerks are an absolute requisite to the proper administration of justice. Inexperience and unfitness cause waste. But it is not so simple a matter to determine whether their salaries shall be fixed by the Judicial Council or by the legislature. The reasons in support of the inclusion of the provision are these: (1) The work and responsibility in the various counties is not uniform. A uniform salary would be too high in some instances and too low in others. If made to fit each particular job the duty must rest with the court. A legislature would bungle it and salaries fixed by county boards might be so low as to prejudice the work of the courts; (2) Experience in certain localities has proved very clearly that it is demoralizing to the ministerial officers of a court to be employed by the court and to look elsewhere for a fixing of salaries. It makes them an organized group of solicitors for salary increases, acquiring political power for this sordid end; (3) The Court itself would hold its officers to a high standard of performance and could be trusted to be neither niggardly nor wasteful. Legislatures and county boards inevitably treat these offices as party perquisites, and to this end a number of officers, each with a small amount of work and a small salary, and a frequent turn-over of the offices, are found convenient.

SECTION 18. **Meetings of Judges.**] Meetings of the Judges of the Supreme Court and meetings of the District and County Judges of the several districts shall be held separately at least once in each quarter, at times and places to be designated by the presiding Justices. The Chief Justice shall be notified of all department and district meetings and shall, in his discretion, attend, preside and take part in such meetings. The judges of all departments shall meet together and in departments once

[9] This was done successfully in the case of the Federal Circuit and District Courts before the former were abolished.

in each year at a time and place to be designated by the Chief Justice. At all such meetings the judges shall receive and investigate or cause to be investigated all complaints pertaining to the operation of the courts in which they sit, and the officers thereof, and shall take such steps in reference thereto as they may deem necessary and proper. The judges shall have power at any meeting, and it shall be their duty, to recommend to the Judicial Council all such rules and regulations for the proper administration of justice as to them may seem expedient.

The important function fulfilled by meetings is explained in the introduction.

SECTION 19. **Impeachment and Removal.]** Any judge may be removed from office by impeachment in the manner provided in or authorized by this constitution for impeachment. The General Assembly may, for cause entered upon its journals, upon due notice given and opportunity for defense, remove from office any judge upon the concurrence of two-thirds of all the members elected to each house.

Removal of judges by legislative vote has been possible in Massachusetts for over a century, and its conservative use proves that it is no source of danger. At the same time it appears to escape the criticism now generally leveled at impeachment, that it is practically unworkable except in the most extreme cases.

SECTION 20. **State Expense.]** All remuneration paid for the services of judges and officials provided for under this Article shall be paid by an appropriation by the Legislature, and shall be reckoned as part of the expense of the judicial establishment under this Article. The Legislature may by law provide for the apportionment among the several counties of the state of the expense of the maintenance of the General Court so far as the same may exceed the revenues received therefrom.

If there is in any state a different plan for financing the courts which is giving satisfaction that plan should be retained. The same comment fits the succeeding section.

SECTION 21. **Fees Paid to State Treasurer.]** Subject to alteration under rules made by the Judicial Council the fees taxed shall be such as were at the establishment of the General Court provided by law. All such fees and all masters' fees shall be paid to the Clerk of the General Court. All fines collected shall be paid to the Clerk. All fees, costs and fines paid to the Clerk shall be accounted for by him monthly and paid to the State Treasurer.

SECTION 22. **Power of Legislature.]** When requested by written resolution of a majority of the Judicial Council, the Chief Justice concurring therein, the Legislature shall have power to enact legislation in conflict with this Article.

This section should remove objection to a judiciary article which is thought to go unduly into detail or to contain matter which for convenience of amendment would better be in statutory form. By requiring concurrence on the part of the General Court and the legislature all danger of "ripper" legislation is removed, and still opportunity is provided for making any correction which experience may call for.

Arbitration Society of America

Men Prominent on the Bench, at the Bar and in the Business World Unite to Promote Voluntary Adjudication Under Abritration Statutes

A movement to give wider application to the New York state arbitration law, to encourage the adoption of a similar law in other states and promote the practice of arbitration was launched recently in New York City by the newly incorporated Arbitration Society of America. The personnel of the Society's officers and directors and the support accorded it by the bench and bar of New York City, by prominent commercial men, and by the press, all point significantly to the trend of public opinion and to the growing belief that a great deal of private litigation can be adjudicated in voluntary tribunals with advantage to the parties and to the public courts.

The following statement of the Society's purposes was written especially for this JOURNAL.

It is interesting to note with what unanimous approval the Bench and Bar of New York City and State have hailed the inception of the Arbitration Society of America, which is now creating machinery for the speedy, inexpensive and lawful determination of all business differences and controversies by arbitration.

As the first step, this Society is now organizing a People's Tribunal of Arbitration in New York City which will be a court operating without red tape, without complicated rules of practice and procedure, or any other of the obstacles to quick and conclusive disposition of the issues that will come before it.

The nation-wide significance of the movement is shown in the fact that this tribunal is but the initial step toward the fulfillment of a carefully-matured plan to establish a like tribunal in every large American city, where men can obtain simple justice without delay and without burdensome expense.

The full accomplishment of this impressive project depends upon the enactment in the various states of arbitration laws in agreement with the arbitration law of the State of New York, upon which the movement is securely founded. The new Society, in preparation for its national work, is establishing branches as rapidly as possible, and no doubt remains that as an outcome of its work, and of the efforts which are being put forth by the American Bar Association for a uniform arbitration law, the project of the People's Tribunal of Arbitration will be a live legislative issue in several states next winter.

The reception accorded the Society by the metropolitan papers, when it was launched in New York City three months ago with a banquet at the Lawyer's Club, left no room for doubt on the score of press endorsement. Since then the unique project for a People's Tribunal of Arbitration, free from the shackles of red tape and complicated procedure, has been editorially approved by influential newspapers in almost every state in the Union.

Rarely in the history of modern journalism has an organization received the editorial greeting which has been accorded the Arbitration Society of America, and its impressive plan for public service.

There is a reason for it. Newspaper editors—alert of mind, fingers on the public pulse, and attention riveted upon the public needs and public sentiment—have long sensed the imperative necessity for relief from the "law's delays."

They know, better than most men, that these "law's delays"—unavoidable under the complicated system of our court procedure—are breeding *mistrust of the law* in the hearts of the people, and in the Society's purposes they see the promise of a justice that will be prompt in its action and open to all the people. Naturally,

they endorse the great experiment and wish it every success.

We Americans pride ourselves upon our democratic achievements, our leadership in all things that mark the progress of the world. Yet, in one great essential thing, namely, the administration of justice, we are content seemingly to trail along in fifth or sixth place in the march of nations.

Great Britain (in England, Wales and Scotland), Denmark, Norway, Sweden and other nations, have long since opened short roads to substantial justice to their people in the settlement of controversies, relieving the pressure upon their courts of law and saving their people from that greatest of evils—a slow and halting administration of justice.

Into this situation now steps the Arbitration Society of America with its carefully considered plan for a People's Tribunal of Arbitration in every American city.

It is a gratifying fact that there is nothing in the proposition to create the slightest doubt of its intrinsic merit and its absolute integrity. Nothing could be clearer than the fact that this plan in no sense involves a competition with the courts. On the contrary, it will co-operate with, and supplement, the courts. The method it will create for the determination of controversies and differences, is the method provided in the statute law in the State of New York and supported by the full and cordial approval of the courts of that state.

If given public support—and there is the clearest possible evidence that this support will be forthcoming—it is estimated that the proposed Tribunals of Arbitration will reduce the immense volume of litigation in New York fully fifty per cent and will insure to the people a speedy administration of justice and a vast saving of time, money and worry. To countless thousands who have had personal experiences with the law—its boundless technicalities and its destructive "delays"—making of justice so frequently a hollow sham and a flagrant mockery, the plans for the new People's Tribunal will furnish food for serious thought. To many of them, the new movement will make an instantaneous and strong appeal. They will see in the simple common sense rules of procedure that will govern this tribunal, the promise of something akin to a legal millennium.

Here are a few of the cardinal facts culled from the literature of the Society which is blazing the way to speedy and inexpensive justice for the masses in the determination of their honest business differences.

In this new Tribunal, disputants are not required to be represented by lawyers. They will, however, be permitted to have the assistance of legal counsel at hearings. The large majority will doubtless avail themselves of this method in order to insure a clear and helpful presentation of their cases, but this course will not be obligatory. In other words, there will be no room in this court for the professional maneuvering and eloquent pleading of legal counsel. Here, the *facts alone,* will prevail.

"Disputants applying at this tribunal," according to the official announcement, "need only *sign an agreement to arbitrate.* All arrangements for the services of an arbitrator, the time of hearings, the summoning of witnesses, assignment of special court rooms, etc., will be made by the Society. The disputants have but to agree to a settlement of their controversy by one or more arbitrators selected by themselves, or by the Society at their request."

Only a small charge will be made for the use of court rooms and equipment and for services in securing arbitrators and conducting the hearings. Every dollar taken in by the Society will be applied to the upkeep of the tribunal and to the extension of the work throughout the country.

This fact is guaranteed by the corporate character of the Society. It is a "membership corporation," and under the law none of the officers, governors and members can profit through its operations.

It will be a public institution, designed and operated to confer its benefits upon the public at large. All of the people will share equally in its benefits and on equal terms.

The procedure will be modelled upon the rule of common sense. It will be simple and direct. The Arbitrators will designate the time for the hearing and the disputants will appear before them. Each disputant will state his case, produce his witnesses, if any, and submit whatever documents are material. There will be no rules of evidence in this court to exclude testimony as "irrelevant, incompetent and immaterial," and the like. Each disputant will state his own story in his own way and the arbitrator, exercising common sense, will know what to consider and what to reject.

In a court of law, litigants are limited to the particular judge and to the particular jury provided. But in the proposed tribunal there will be no limit whatever to their choice. They can pick and choose from the very best in intelligence and sound judgment that the City of New York, with its six millions of people, or the country with its hundred and more millions, can supply.

The beauty of it is, that all the Society is pledged to accomplish can be done legally under the wide authority given by the arbitration law of the State of New York.

In the active canvass for available arbitrators willing to serve without compensation, the Society has made the significant discovery that it is the almost universal feeling among men of affairs that no other function in life holds more of usefulness, dignity and honor than that of acting as an impartial judge between men in their honest differences. Men of unquestioned prominence in every walk of life are accepting the Society's invitation to serve in this capacity as the highest compliment that could be paid to their intelligence, character and sense of public duty.

The outstanding personnel of the governing Board of the new Society indicates that the movement will be carried forward with vigor and determination. The Board includes Jules S. Bache, banker; Henry Ives Cobb, architect; Robert Grier Cooke, President of the Fifth Avenue Association; Moses H. Grossman, former judge and head of the law firm of House, Grossman & Vorhaus; Charles L. Guy, justice of the Supreme Court of the State of New York; Robert Lee Hatch, President of the Rotary Club of New York; Almet F. Jenks, former Presiding Justice of the Appellate Division, Supreme Court, Second Department of New York; William B. Joyce, President of the National Surety Company; Frederic Kernochan, Chief Justice of the Court of Special Sessions; Samuel McCune Lindsay, of Columbia University and President of the New York Academy of Political Science; Samuel McRoberts, President of the Metropolitan Trust Company; James A. O'Gorman, former United States Senator and Supreme Court Justice; Thomas I. Parkinson, Vice-President of the Equitable Life Assurance Society; William C. Redfield, former Secretary of Commerce in the cabinet of President Wilson; David A. Schulte, President of the Schulte Cigar Stores; Franklin Simon, President of Franklin Simon & Co; Frank H. Sommer, Dean of the Law School of New York University; Harlan F. Stone, Dean of the Law School of Columbia University.

The late Emerson McMillin, a notable figure in the financial life of New York, and ever active in broad philanthropy and unselfish public service, was the first president of the Society. His sudden death followed close upon the launching of the movement. In the public tribute to his memory, it was said that his tireless service in aiding the organization of this Society marked "a fitting valedictory to his splendidly useful life." No selection has yet been made among the eminent men who are being considered for the vacancy.

The Vice-Presidents of the Society are Professor Samuel McCune Lindsay, eminent in the field of political science, and former Judge Moses H. Grossman, who

holds distinguished rank at the New York Bar.

"If the scales of justice could be held evenly balanced, and the unalloyed truth about each side of a given case placed on opposite sides of the scales to determine which outweighs the other, then there would be absolute justice," said Judge Grossman, who is not only vice-president but the founder of the Society, in speaking of its aims and ideals. "That however is not quite the process. The ability and astuteness of counsel, his knowledge of the law, pleading, practice, procedure and evidence; his alertness; his persuasiveness, his impressiveness; these are the things which count with juries, outweighing the evidence which should be the controlling factor. So it develops into a battle of wits between legal giants, or between a legal giant and a legal dwarf. The laurels go to the abler of the two lawyers. Merely because these facts are unpleasant to contemplate, we must not, like the ostrich, bury our heads in the sands of smug hypocrisy and say that they do not occur. They do occur, and they occur much too frequently. How long will they continue? When shall we, as officers of the courts, sworn to aid in the administration of justice, face the situation squarely and honestly and find the true remedy?"

"For a quarter of a century the bar has been battling with this important problem in an honest effort to achieve the best result. Like Senator Elihu Root, I say to my brothers at the Bar in reference to the new tribunal, 'I ask you to help in it.' I urge you all to give to the Arbitration Society of America your wholehearted endorsement and your loyal support, believing, as I do, that my plea is in your interests, in the interests of your clients, and in the interests of the courts. Above all, it is in the interest of justice."

Judge Grossman has not pleaded in vain. From the judges of all the New York Courts, from lawyers, from bankers and from leaders in every trade and industry, included within the scope of our great national activities have come cordial endorsements. The press of the country has unanimously welcomed the movement as one of epoch-making quality. It now remains to be seen what the people of New York City and of the country at large, will do with it. It opens to them a short road to substantial justice in the settlement of their business differences. That is certain. It promises them complete relief from the crushing burdens of expense and prolonged anxiety which litigation inevitably puts upon them. It is their *great opportunity* to bring justice within the range of their own needs; to make of it the guardian of their own interests; and to bring it within the easy reach of all.

As Others See Us

A writer in the Canada *Law Journal* after referring to the procedure on the dismissal of certain appeals by the Supreme Court of Canada says: "Such a course finds its parallel only in the practice which obtains in a few state courts in the United States where counsel, in objecting with reason to a question being put, is met by the summary ruling 'objection overruled.'" The practice is of course so common that it has never occurred to the average American lawyer that there is anything arbitrary or unjustifiable in it, and it comes with something of surprise that it should be so regarded by a lawyer from a jurisdiction where the powers of judges are supposed to be far more extensive than in the United States. The fact seems to be that our English brethren, while they have magnified the prerogatives of the bench, have not done so at the expense of the bar. The discourtesy with which young attorneys are often treated by American trial judges would be apt to be resented in England as an affront to the entire bar. English counsel do not often permit the judge to forget that they are as much ministers of justice as he; also they do not often forget it themselves. Which of these facts is cause and which effect some better informed student of the British system must answer. Viewed from the

coign of the public mission of the bar, it is true that if counsel advance reasons they are entitled to have them answered by reason. From this viewpoint the judge is a co-operator with counsel in an effort to do justice in the case; counsel occupy a quasi-official station which entitles them to more than a mere curt decision. The duty of a trial court to give more than a bare decision differs only in degree from the like duty of an appellate court. In theory the criticism of our procedure seems perfect. But like many another theory its practical operation is not so satisfactory. Every practitioner is acquainted with the argumentative and explanatory judge, before whom trials are protracted by interminable wrangling while the real issues are lost to sight. The fact that English trials proceed with much more free co-operation between court and counsel than in our practice, and at the same time with much greater expedition, is due to conditions of long growth which it is impossible to transplant at once. The American bar has not the dignity or the independence which it should have or which is enjoyed by the profession elsewhere. The statement that an attorney is an officer of the court is rarely made except as a prelude to the imposition of some penalty on him by the court. There should be an advance toward a self-governing bar taking a prominent part in the establishment and interpretation of rules of procedure. But, as a prelude to that change, there must be a growing recognition at the bar that privileges connote duties not only to the client but to the public.

—*Law Notes,* Vol. XXIV, p. 102.

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The Lawyer of the Old School

was often heard to say "Somewhere between the 10th and 20th Howard there is the case of Watson v. Tarpley, which is controlling on this point."

But the Younger Attorney says

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How can I find in three minutes in the Second Decennial Digest the latest and controlling authorities in point with an old case I have found in the text-books, encyclopedias or reports.

.....

To
West Publishing Company .....

Vol. 6 OCTOBER, 1922 No. 3

Journal
of the
American Judicature Society

To Promote the Efficient Administration of Justice

CONTENTS

"I know there are some who think that judges should hold themselves in an isolated way on every subject, and only decide the cases that come before them; but I do not agree with that view. I think a judge may take an interest in matters of legal reform and may be active in respect to it, and in expression of opinion in regard to it, without in any way demeaning himself or interfering with the dignity of his office."—*Chief Justice Taft.*

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Bulletin IV-A—Second draft of so much of the Metropolitan Court Act as relates to the Selection and Retirement of Judges. This applies in large part to courts outside of large cities. Pp. 127.

Bulletin IV-B—Second draft of Metropolitan Court Act. Court organization for large cities. Pp. 94.

Bulletin VI—Organization of Courts, by Roscoe Pound; Methods of Selecting and Retiring Judges, by Albert M. Kales; Local Courts of Limited Jurisdiction (for rural counties), by Herbert Harley. Pp. 68.

Bulletin VII-A—Revised draft of a State-wide Judicature Act. A plan for a unified state court system extending from the Supreme Court to the Justice of the Peace. Pp. 198.

Bulletin X—The Selection, Tenure and Retirement of Judges, by James Parker Hall. Pp. 32,

Bulletin XII—A Report on Commercial Arbitration in England, by Samuel Rosenbaum. Of special interest to commercial lawyers and trade associations. Pp. 72.

Bulletin XIV—Rules of Civil Procedure Supplementary to the State-wide Judicature Act (Bulletin VII-A). Pp. 200.

Bulletin XV—Conciliation and Informal Procedure, with model acts. Pp. 32.

The Municipal Court of Chicago, historical and descriptive. Pp. 48.

Courageous Expression by Chief Justice Taft

We cannot forego the temptation to quote again here one of the numerous quotable statements made by Chief Justice Taft at the San Francisco meeting of the American Bar Association. His keen interest in stirring the bar to fight for improvements in the administration of justice gives heart to all within and without the profession of law who have unrealized ideals of judicial power. In his attendance upon the often tedious sessions, in his stirring appeals for bar organization and the discharge of public duties, the Chief Justice sets an inspiring example to both bench and bar.

No apology is ever needed for such independence and loyalty to an ideal, but in view of the indifference of many judges great and small, the Chief Justice saw fit, in his remarks addressed to the Conference of Bar Associations and reported in this number, to say:

"I know there are those who think that judges should hold themselves in an isolated way on every subject, and only decide the cases that come before them; but I do not agree with that view. I think a judge may take an interest in matters of legal reform and may be active in respect to it, and in the expression of opinions in regard to it, without in any way demeaning himself or lessening the dignity of his office."

A New Era Opens

The illuminating address by Chief Justice Taft which was published in our last number was prepared and delivered before the passage of the bill which unifies the federal judicial system. That address was far more than a mere resume of past and present conditions. It was a programme calling for unification of the machinery of justice and for modernizing of procedure under the rule-making power.

That it is an historical document is now entirely apparent. Since its delivery the bill which its author urged upon Congress has been passed and in consequence thereof the best ideals of judicial organization are given effect in the national courts. Power and responsibility for utilizing judicial power to the fullest extent are centralized in the Chief Justice, to be utilized at this critical period by the staunchest supporter of the principles involved.

It is not too early now for congratulations over the progress made and the bright prospects, for before long the providential circumstance of Chief Justice Taft's appointment, in view of his broad understanding of the needs of the courts, will be generally recognized. Taking advantage of the need for more judges, which might otherwise have led merely to greater complexity and waste, the Chief Justice has obtained legislation which creates a right foundation for procedural reform. Now let the American Bar Association press for the fulfillment of its resolution adopted at San Francisco. This is brought appreciably nearer by the first great success. Let Congress complete its share of the great programme by creating both the temporary commission, to prepare rules for merging law and equity in one form of action, and the permanent commission to function generally for the courts in the exercise of rule-making power.

These great and necessary developments do not seem far distant now. In modernizing our federal judiciary we are protecting liberty under law and stabilizing popular government. It is idle to demand of naturalized citizens that they shall revere a system which they hear criticized by the greatest authorities in the nation. The only programme of Americanization that is worth a moment's effort

is one based upon performance. Restore to our judicial system its inherent power to adjudicate under rules of its own making and it will cope with the difficulties of the future even better than it coped with those of the past.

If every representative and senator whose blood is alleged to boil over criticisms of the federal judiciary would vote for the substantial and conservative reforms asked by Chief Justice Taft, the entire programme could be accomplished within a year or two, and the vast benefits conferred would by no means stop with the federal courts, but would swiftly be reflected in state legislation, speeding that time when we will have no courts except those that deserve veneration.

Chief Justice Taft's Reply to Lord Shaw

It was an instance of employing a jest to say a very serious thing when Chief Justice Taft, in his address to the Conference of Bar Association Delegates at San Francisco, reported in this number, commented upon Lord Shaw's opinions on the subjects of judicial salary and judicial primaries in the United States. As to these the distinguished Scotch jurist thought the former insufficient and the latter not calculated to produce the highest judicial results.

If the Chief Justice had devoted the entire address to this point he could hardly have given a better answer to Lord Shaw than in saying: "I assured him that one of the strongest evidences of the wonderful power of self-government of the American people was the fact that we had survived with such a successful administration of justice and system of elective judges . . . ."

Yes, we have survived, not wholly without success, but in the opinion of Chief Justice Taft, not so much because of an inherent virtue in judicial elections as because of the willingness of the American people to make the best of a bad thing. There have been signs for a long time that there is no inexhaustible fund of tolerance to be drawn upon. The people for a long time have pleaded for reform in justice. They do not specify the means. They are not so doctrinaire in respect to judicial selection as the bar.

Yes, we have muddled through, but at what a terrible cost to the judges who have made it possible—who have taken great hazards and made great sacrifices for the public good. Whenever the public has secured an outstanding member of his profession to serve in judicial capacity it has required of him that he forego forever the hope of more than a meager living, that he submit to the worries and costs of campaigns, that he face the ire of political bosses, and often that he be given more work than he can humanly accomplish. The nature of the service has prevented judges from working co-operatively. It has put a premium on demagoguery and a penalty on faithful service. And yet we have survived.

The demand now is that all judges shall apply themselves diligently in order that there shall be less of the delay attributable to crowded dockets. This is a reasonable demand when reasonably interpreted. It should imply enough judges to do the work without strain. It should imply an efficiency organization that equalizes responsibility and permits judges to assist one another. It should imply such terms of service that faithful judges will never anywhere need to worry concerning their continuance in the public service.

It is an aphorism that no private business could survive if managed like government. Back of this trite remark lies a truth which should be recognized. It is this: that government profits from the creditable desire of public minded individuals to render a great service. Perhaps government will always take a profit from this source, but the less it leans on such a special and rare quality, and the more it competes on equal terms with private employment, the better for the public service.

New Law Unifies Federal Judiciary

Chief Justice Made Executive Head of Judicial Council—Statistics, Meetings, Transfer and Assignment of Judges Provided For

The judicial system of the United States is unified. Act No. 298, Sixty-seventh Congress, approved Sept. 14, 1922, creates a unified system of trial and appellate courts with statistical records, a judicial council, a chief judicial superintendent and the transfer and assignment of judges. It embodies the principle of unification in its entirety.

The subject of assisting the United States District courts was before Congress more than a year. Even before the introduction of the bill named for Attorney General Daugherty, and described at the 1921 meeting of the American Bar Association by Chief Justice Taft, it was known that the District courts were in arrears over 120,000 cases. The cause was obvious, for there had been a large increase in statutory offenses cognizable by the courts before the flood of cases under the Volstead Act.

The District courts constituted a loose system of local courts. The pressure of business became much more severe in some districts than in others and there were other variances, but no authority existed to equalize this work or generally supervise the highly important administrative details of the system thus constituted of scattered units.

The accustomed way of meeting a growth of business was to create additional judgeships. This was the sort of work that representatives and senators were familiar with. If no new idea had arisen there would have been merely the usual fight over new judgeships and their appointees, and relief would have been provided more on a basis of political strength and resourcefulness than on existing or expected needs. At this juncture a study of the situation was made under the auspices of the attorney general and with the aid of Chief Justice McCoy of the Supreme Court of the District of Columbia. Chief Justice Taft did not assume that an increase of United States judges, or a possible reconstruction of the system, was wholly a legislative responsibility from which he should hold aloof. On the contrary, he appears to have felt a deep responsibility for the state of affairs and keen interest in methods looking to relief.

The Chief Justice had long been known as a firm believer in improved court organization, in emphasizing *administration* in the administration of justice. The studies which he had made in this field had convinced him that a great deal of all the remediable defects attributable to American courts have their source in lack of proper organization and centralized authority. In public writings and addresses on judicial administration he never lost an opportunity to express his faith in the principle of unification.

It was singularly fortunate, then, that when the federal trial courts were cracking under undue strain Mr. Taft should have been made administrative head of the entire system. There were, of course, others who appreciated the opportunity for notable legislative advance in respect to the federal courts, but were it not for the great esteem felt for the Chief Justice, and for his tact and persistence, something far inferior to the actual law would have resulted.

As it is, instead of merely providing additional trial judges for certain districts, the act deals with the entire situation. Additional judges are provided, but this is only a part of the law, for it provides a comprehensive administrative system extending from the Chief Justice, who is made the responsible head, to the trial judges.

Uniform records of business are to be kept and reports made to the Chief Justice as of August 1 in each year. Then in the last week of September the senior circuit judges of all the circuits shall meet with the Chief Justice in Washington to advise as to the needs of their respective circuits "and as to any matters in respect of which the administration of justice in the courts of the United States may be improved. . . . Said conference shall make a comprehensive survey of the condition of business in the courts of the United States and prepare plans for assignment and transfer of judges to or from circuits or districts where the state of the docket or condition of business indicates the need therefor, and shall submit such suggestions to the various courts as may seem in the interest of uniformity and expedition of business."

Emphasis may be laid upon promptness in criminal trials through a provision that the Chief Justice may call upon the Attorney General for a detailed report on pending cases.

These provisions make the Chief Justice head of a unified system, the senior judges of the Circuit Courts constituting with him a judicial council which will receive complete statistical reports and have full power to utilize the judicial power to the fullest extent through the transfer and assignment of judges. The system formerly had some elasticity, but this is extended and means is provided for an orderly and comprehensive administration of the entire system on a basis of adequate information.

Like most reform legislation, this law is tardy. Conditions have gone from bad to worse. The strong arm of the government, never more popularly demonstrated than through the efficiency of criminal procedure in the District Courts, is seen to vacillate. The federal courts are in a very bad way. Delay promotes delay; continuances waste a court's time; delays spawn appeals. The body of judiciary available, even with the accretions soon to be made under the new law, constitute but a very thin line of defense.

But if any way out of the bogs and quicksands can be found it will be found under the powers established by the new act and through the administration of the Chief Justice, to whose intelligence and unselfish effort its passage is largely due.

So much interest attaches to the act that we publish it herewith in full:

An Act for the appointment of an additional circuit judge for the Fourth Judicial Circuit, for the appointment of additional district judges for certain districts, providing for an annual conference of certain judges, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the President be, and he is hereby, authorized to appoint, by and with the advice and consent of the Senate, the following number of district judges for the United States district courts in the districts specified in addition to those now authorized by law:

For the district of Massachusetts, two; for the eastern district of New York, one; for the southern district of New York, two; for the district of New Jersey, one; for the eastern district of Pennsylvania, one; for the western district of Pennsylvania, one; for the northern district of Texas, one; for the southern district of Florida, one; for the eastern district of Michigan, one; for the northern district of Ohio, one; for the middle district of Tennessee, one; for the northern district of Illinois, one; for the eastern district of Illinois, one; for the district of Minnesota, one; for the eastern district of Missouri, one; for the western district of Missouri, one; for the eastern district of Oklahoma, one; for the district of Montana, one; for the northern district of California, one; for the southern district of California, one; for the district of New Mexico, one; and for the district of Arizona, one.

A vacancy occurring, more than two years after the passage of this Act, in the office of any district judge appointed pursuant to this Act, except for the middle district of Tennessee, shall not be filled unless Congress shall so provide, and if an appointment is made to fill such a vacancy occurring within two years a vacancy thereafter occurring in said office shall not be filled unless Congress shall so provide: *Provided, however,* That in case a vacancy occurs in the district of New Mexico at any time after the passage of this Act, there shall thereafter be but one judge for said district until otherwise provided by law.

Every judge shall reside in the district or circuit or one of the districts or circuits for which he is appointed.

Sec. 2. It shall be the duty of the Chief Justice of the United States, or in case of his disability, of one of the other justices of the Supreme Court, in order of their seniority, as soon as may be after the passage of

this Act, and annually thereafter, to summon to a conference on the last Monday in September, at Washington, District of Columbia, or at such other time and place in the United States as the Chief Justice, or, in case of his disability, any of said justices in order of their seniority, may designate, the senior circuit judge of each judicial circuit. If any senior circuit judge is unable to attend, the Chief Justice, or in case of his disability, the justice of the Supreme Court calling said conference, may summon any other circuit or district judge in the judicial circuit whose senior circuit judge is unable to attend, that each circuit may be adequately represented at said conference. It shall be the duty of every judge thus summoned to attend said conference, and to remain throughout its proceedings, unless excused by the Chief Justice, and to advise as to the needs of his circuit and as to any matters in respect of which the administration of justice in the courts of the United States may be improved.

The senior district judge of each United States district court, on or before the first day of August in each year, shall prepare and submit to the senior circuit judge of the judicial circuit in which said district is situated, a report setting forth the condition of business in said district court, including the number and character of cases on the docket, the business in arrears, and cases disposed of, and such other facts pertinent to the business dispatched and pending as said district judge may deem proper, together with recommendations as to the need of additional judicial assistance for the disposal of business for the year ensuing. Said reports shall be laid before the conference herein provided, by said senior circuit judge, or, in his absence, by the judge representing the circuit at the conference, together with such recommendations as he may deem proper.

The Chief Justice, or, in his absence, the senior associate justice, shall be the presiding officer of the conference. Said conference shall make a comprehensive survey of the condition of business in the courts of the United States and prepare plans for assignment and transfer of judges to or from circuits or districts where the state of the docket or condition of business indicates the need therefor, and shall submit such suggestions to the various courts as may seem in the interest of uniformity and expedition of business.

The Attorney General shall, upon request of the Chief Justice, report to said conference on matters relating to the business of the several courts of the United States, with particular reference to causes or proceedings in which the United States may be a party.

The Chief Justice and each justice or judge summoned and attending said conference shall be allowed his actual expenses of travel and his necessary expenses for subsistence, not to exceed $10 per day, which payments shall be made by the marshal of the Supreme Court of the United States upon the written certificate of the judge incurring such expenses, approved by the Chief Justice.

Sec. 3. Section 13 of the Judicial Code is hereby amended to read as follows:

"Sec. 13. Whenever any district judge by reason of any disability or necessary absence from his district or the accumulation or urgency of business is unable to perform speedily the work of his district, the senior circuit judge of that circuit, or, in his absence, the circuit justice thereof, may, if in his judgment the public interest requires, designate and assign any district judge of any district court within the same judicial circuit to act as district judge in such district and to discharge all the judicial duties of a judge thereof for such time as the business of the said district court may require. Whenever it is found impracticable to designate and assign another district judge within the same judicial circuit as above provided and a certificate of the needs of any such district is presented by said senior circuit judge or said circuit justice to the Chief Justice of the United States, he, or in his absence the senior associate justice, may, if in his judgment the public interest so requires, designate and assign a district judge of an adjoining judicial circuit if practicable, or if not practicable, then of any judicial circuit, to perform the duties of district judge and hold a district court in any such district as above provided: *Provided, however*, That before any such designation or assignment is made the senior circuit judge of the circuit from which the designated or assigned judge is to be taken shall consent thereto. All designations and assignments made hereunder shall be filed in the office of the clerk and entered on the minutes of both the court from and to which a judge is designated and assigned."

Sec. 4. Section 15 of the Judicial Code is hereby amended to read as follows:

"Sec. 15. Each district judge designated and assigned under the provisions of Section 13 may hold separately and at the same time a district court in the district or territory to which such judge is designated and assigned and discharge all the judicial duties of the district or territorial judge therein."

Sec. 5. Section 18 of the Judicial Code is hereby amended to read as follows:

"Sec. 18. The Chief Justice of the United States, or the circuit justice of any judicial court, or the senior circuit judge thereof, may, if the public interest requires, designate and assign any circuit judge of a judicial circuit to hold a district court within such circuit. The judges of the United States Court of Customs Appeals, or any of them, whenever the business of that court will permit, may, if in the judgment of the Chief Justice of the United States the public interest requires, be designated and assigned by him for service from time to time, and until he shall otherwise direct, in the Supreme Court of the District of Columbia or the Court of Appeals of the District of Columbia, when requested by the Chief Justice of either of said courts.

"During the period of service of any judge designated and assigned under this Act he shall have all the powers, and rights, and perform all the duties, of a judge of the district, or a justice of the court, to which he has been assigned (excepting the power of appointment to a statutory position or of permanent designation of newspaper or depository of funds): *Provided, however*, That in case a trial has been entered upon before such period of service has expired and has not been concluded, the period of service shall be deemed to be extended until the trial has been concluded.

"Any designated and assigned judge who has held court in another district than his own shall have power, notwithstanding his absence from such district and the expiration of the time limit in his designation, to decide all matters which have been submitted to him within such district, to decide motions for new trials, settle bills of exceptions, certify or authenticate narratives of testimony, or perform any other act required by law or the rules to be performed in order to prepare any case so tried by him for review in an appellate court; and his action thereon in writing filed with the clerk of the court where the trial or hearing was had shall be as valid as if such action had been taken by him within that district and within the period of his designation."

Sec. 6. Section 118 of the Judicial Code, as amended, is hereby further amended to read as follows:

"Sec. 118. There shall be in the second, seventh, and eighth circuits, respectively, four circuit judges; and in each of the other circuits, three circuit judges, to be appointed by the President, by and with the advice and consent of the Senate. All circuit judges shall receive a salary of $8,500.00 a year each, payable monthly. Each circuit judge shall reside within his circuit, and when appointed shall be a resident of the circuit for which he is appointed. The circuit judges in each circuit shall be judges of the circuit court of appeals in that circuit, and it shall be the duty of each circuit judge in each circuit to sit as one of the judges of the circuit court of appeals in that circuit from time to time according to law: *Provided*, That nothing in this section shall be construed to prevent any circuit judge holding district court or otherwise, as provided by other sections of the Judicial Code."

Sec. 7. All laws or parts thereof inconsistent or in conflict with the provisions of this Act are hereby repealed.

Approved, September 14, 1922.

Walter F. Dodd's Book on State Government

An excellent book entitled "State Government" has recently been published by the Century Company. The author is Walter F. Dodd, of the Chicago bar, an authority of national repute on constitutional and political subjects. The manner of treatment is one which emphasizes state unity, the numerous subdivisions of state territory and power being considered as a part of an integrated state system.

Mr. Dodd was called to the management of the Illinois Legislative Reference Bureau when Governor Lowden was elected and assumed the great work of unifying one hundred or more separate boards and commissions as parts of an orderly executive department. The technical side of the work, and the drafting, were entrusted to Mr. Dodd, the result being the reorganization embraced in the Illinois civil administrative code, the first work of its kind and the most significant single instance of legislation in the history of any state. This important work has led in the past three years to similar statutes in several states and to an extension of Mr. Dodd's services in this field as special adviser.

Probably no other writer on political science in our times has combined practical experience with theoretical learning to the same degree as Mr. Dodd. His style is exceedingly clear and direct. The volume is invaluable as a concise expository treatment of the subject of American state government and has already been adopted as a textbook in several leading universities.

Judicial institutions are dealt with in three chapters, embracing sixty pages. The chapters are entitled: The Work of the State Courts, The Organization of State Courts and The Adjustment of Judicial Organization to Present Judicial Tasks. This field of the judiciary has been neglected by political science writers so that such a concise and authoritative exposition cannot be found in any other volume. Since Mr. Dodd is himself a practicing lawyer he is fitted to deal with the courts with confidence. The third chapter is a critical survey of the administration of justice, executed with judicial fairness. It contains also a presentation

of such modern proposals as the unification of courts and administrative direction of all the agents of justice.

The author rendered very valuable assistance within the past few months as secretary of the Consolidated Courts Committee, an organization of 1,000 members of the Chicago Bar asking for the consolidation of Cook County courts, which was finally effected in the new constitution. He had previously, in anticipation of the convening of the Constitutional Convention, prepared material covering the entire constitutional field, which was published by the state of Illinois in more than a dozen pamphlets and which constitutes a considerable body of material of great value for all workers in this field.

Chief Justice Taft Addresses Bar Conference

Duties and Opportunities of the Profession Must Be Met by Providing Organic Structure—American Bar Less Influential Than English Bar in Legislation

The notable address of Chief Justice Taft on needed reforms in the administration of justice in the federal courts, published in the August number of the JOURNAL, was not his only contribution to the sessions of the American Bar Association held in San Francisco. He spoke more briefly, and without notes, at the evening session of the Conference of Bar Association Delegates. The two preceding sessions had been devoted largely to consideration of bar organization and federation. The following address of Chief Justice Taft proved his faith in the growing movement for integrating the bar and providing it with means for accomplishing its public duties:

Mr. President, Gentlemen and Ladies of the American Bar Association: The real reason why I am late is that Lord Shaw ventured to suggest that it would be an improvement in this country if judges had higher salaries, and I had to stay long enough to refute that utterly ridiculous and extreme idea. It is a great pleasure to be here tonight and to meet the representatives of these many bar associations. I don't think that the bar associations have been treated with proper respect by the members of the bar. I think the situation is getting better, but I do not think that the leading members of the bar have appreciated the responsibility that is on them to organize the best opinion of the bar and use that best opinion by means of bar associations.

The bar, when organized, will be a powerful instrument for the cultivation of proper public opinion with reference to subjects that are normally within the field of bench and bar. And it should be a part of the duty of every lawyer to make that influence as strong as possible by organization and by contributing to organization. That, I think, was the idea of Mr. Root, and the idea of your present chairman, in doing what has been so effectively done in bringing about this conference and meetings like this.

Advantages of English Bar

It has been my great good fortune to have been in Great Britain—in London—for three weeks during this past summer, and to try to estimate the cause of the influence which the English bar exercises over legislation and over the framing of procedure necessary to make the administration of justice effective. Of course, there is one speaking difference between our bar and the bar of Great Britain, in the fact that the law officers of the government are by their system necessarily a part of the majority in the House of

Commons, and a part of that majority who usually control in reference to measures looking to the improvement of judicial procedure, and that in the House of Lords—the other branch of the legislature — the Law Lords — those who are Lords of Appeal in ordinary, and the retired chancellors, and the acting Lord Chancellor, are all members of that body, and can take direct part in the introduction and the framing of measures for the betterment of judicial procedure; and, therefore, the bar is directly represented by their own leading members in that body which makes the law of procedure and determines the machinery for doing justice. Then, too, they have four Inns of Court, from one of which every lawyer who comes to the bar must be called. These institutions, coming from the Dark Ages, so far back, indeed, that their origin is not distinctly known, exercise an influence that makes for the betterment of everything that the profession is interested in—in the administration of justice, in the maintenance of professional character, because they exercise a very strict discipline upon their members, and in the suggestions of needed reform.

Now, we haven't those things. You can't build up over night an institution of six hundred years' standing in this country, but you can frame organizations which shall represent the best opinion of the bar, and those organizations, gentlemen, only continue to represent the best opinion of the bar when the best members of the bar regard it as their conscientious duty to take active part in the conduct of those organizations.

In pleading for such organizations, we are not pleading for ourselves. We can get along—those of us who are living on salaries that Lord Shaw thought were a little lacking, and those of you who are not dependent on salaries and are living on a good practice, you can get along; but it is in the interest of the public that these organizations should take charge of public opinion and influence for the betterment of the administration of justice. They turn to the lawyers, they turn to judges, and they say, "What are you going to do to remedy the administration of justice?" Lord Shaw had a little doubt as to the system of electing judges, and the primaries for the election of judges. Well, I thought to reassure him on that point. He said that he wondered whether it would make me as good a Chief Justice if I had to go to election next year for that purpose. I told him that doubts have been expressed upon that point, but I was willing to waive discussion. And I assured him that one of the strongest evidences of the wonderful power of self-government of the American people was the fact that we had survived with such a successful administration of justice and system of elective judges; that we had demonstrated what he was doubtful about, as to whether you could have two attitudes, a division in the psychology of a judge, so that he could be entirely impartial with respect to a case and administer justice without fear or favor on the one hand, and then have in the back of his head the thought as to how that judgment might affect the primary that comes next year. And we had proven that it was possible and that it would be interesting to his Scotch metaphysical mind to find how we had weathered that problem and found the possibility of administering justice under a system in respect to which he wished to be informed.

Duty of Judges to Further Reform

But, joking aside, gentlemen, the bar is on trial. I do not wish to say this is a crisis, that we have reached a parting of the ways, because that is too often used on too many occasions, so that it really doesn't mean much. We are working along and we are hoping for better things. We can improve only step by step, but certainly we can improve if we will only build our thoughts for better things into organizations that shall help those who wish to make things better, for I accord that desire to legislatures and to Congress. Help them by formulating a real public opinion of the bar through organizations that are so constituted that we have the right to say that they represent the full,

clear, forcible opinion of that branch of the community engaged in the administration of the law—the bench and the bar.

I believe that it is the duty of the bench to come close to the bar in matters of this sort. I know there are some who think that judges should hold themselves in an isolated way on every subject, and only decide the cases that come before them; but I do not agree with that view. I think a judge may take an interest in matters of legal reform and may be active in respect to it, and in the expression of opinion in regard to it, without in any way demeaning himself or lessening the dignity of his office. It certainly does not interfere with the weight of the testimony of a witness that he knows something about the subject of which he is talking, and that he knows it not from the mere theoretical side, but from the actual practice and the daily contact with the operation of the machinery that has been furnished by the legislature for the doing of justice to all members of the community.

I hope that this Association will continue to grow and to prosper. I hope that it will be the means of making the American Bar Association only the nucleus around which all the bar associations of all the communities, cities, counties, and states shall unite, to make one common concentrated effort to better the administration of justice.

Progress in Bar Integration

Alabama and Oklahoma State Bar Associations Sponsor Bills to Be Introduced in Legislatures—Conference of Delegates Approves Bar Council Plan

The idea of bar integration is marching on. This is evidenced especially by the third annual report of the Committee on Bar Organization of the Conference of Bar Association Delegates, and by recently completed bills to be sponsored by the State Bar Associations of Alabama and Oklahoma.

The Conference approved the recommendation of its Committee that in all bills of this nature provision should be made for a Council of the Bar. The text of the report, appearing below, will explain the meaning of this term. It is to be hoped that the recommendation does not come too late to be incorporated in such drafts. If so it should be possible to amend the bills after introduction. The idea of providing for a council composed of the bar governors, the lawyer legislators and the attorney general to interest itself especially in legislation affecting the administration of justice is a very important one, and should commend itself to the minds of legislators.

A strong committee of the Alabama State Bar Association, headed by Mr. Borden Burr of Birmingham, worked out a draft bill during the summer and submitted it to the Democratic state convention, which approved the draft and made it a part of its legislative program.

The memorial of the committee to the convention contains such a good description of the bill, and such strong reasons for its adoption, that it appears best to quote liberally:

This committee has given to this important subject thoughtful, careful and serious consideration. It has labored faithfully to reach the best conclusions. It has examined judiciary systems and their results in many of the states; has studied much of the available literature on the subject; has sought the benefit of advice of eminent lawyers and judges; has made an earnest effort to harmonize differences and to present a real constructive service. It now begs to submit to the Democratic

party who in Alabama has plenary power, and, therefore, final responsibility, the following unanimous report of their study, investigations and conclusions as to legislative relief both for the bench and the bar.[1]

The Bar

We present this first because we believe that curative action is here most needed, and because from the ranks of the bar our judges must be selected.

Of all professions, we believe that ours carries the greatest responsibilities. Lawyers monopolize essential powers and functions. When a man receives a license to practice law he becomes a part of a necessary monopoly and, in Alabama, of an almost uncontrolled one. Not only does he represent men in their intimate personal relations, but he becomes a member of a profession charged with the highest duties to society; indispensable to self-government; in a major sense the framer of our laws, by whom they are to be enforced, and through whom they must be construed. The future of our Government depends upon the maintenance of justice, pure and unsullied. It cannot be so maintained unless the conduct and the motives of our profession are such as to merit the approval of all just men.

How are we facing this great responsibility? We are continually hearing criticism. The public holds the profession responsible for the misdeeds, incompetency, ignorance and inefficiency of any of its members. The sins of these, the running of cases, unfair settlements of claims, together with reports of the sacrifice of clients' interests, defects in the administration of justice, the law's delays and technicalities, are gradually undermining the confidence of the people in the profession of law, and, what is infinitely worse, causing them to lose respect for law itself. If the legal profession, as it is and should be, is to be charged with the derelictions, incompetency and inefficiencies of its members, then we submit that the profession should be given some authority over its members, should within proper constitutional and supervised limits be allowed to pass upon the qualifications of its members and have the right of discipline over those who prove recreant to the standard that the public insists the profession should maintain. Under our present laws the legal profession is powerless to protect itself against the admission of the incompetent or of the corrupt. Supervisory rights of membership have been given by our legislatures to the doctors, to the accountants, to the undertakers, but not to the profession charged with the primary duty of upholding the law itself. Under our present laws, although the profession is held responsible for all derelictions of its members, it has no power of discipline over them. It cannot become the judge of an accused member, but can only appear as its prosecutor, and then only by the institution of trials before juries. The existing law is also impotent in its very severity. It calls for the extreme penalty in every case, slight or great, of suspension or expulsion, and leaves no room for the exercise of preventive cure by the administration, through the profession, of proper discipline to suit the particular case.

We do not ask the exclusive right of passing upon the qualifications of our membership, but we submit that the legal profession, justly considered as an entity, should as an entity, have the cumulative right of saying that a lawyer not fit to associate with his fellow lawyers is not fit to associate with clients. We submit to your favorable consideration the approval of and the recommendation for passage by the legislature of the legislative act a draft of which is attached to this report. The following is a summary of the proposed bill:

1. It creates a governing body designated "Board of Commissioners of the State Bar," consisting of twenty-one members.

2. The lawyers of the respective twenty-one judicial circuits of the state, by a mail ballot conducted under the supervision of the Clerk of the Supreme Court of

1. The committee also asked for a return to the judicial nominating convention, but this request was denied.

Alabama, the Clerk of the Court of Appeals of Alabama, and the court reporter of the Supreme Court of Alabama, select the members of the Board. Following the election, the Board organizes by the selection of officers, none of whom are to receive salaries except a paid secretary whose salary is not to exceed $200 per month. The Commission, upon organizing, are divided into three groups, holding office and at their first meeting their terms shall for one, two and three years, respectively, be determined by lot, thus insuring a continuity of policy in the administration of the affairs of the Commission.

3. The Commission is given the power, *subject to approval of its rules by the Supreme Court of Alabama,* to determine the qualifications and requirements for admission to the bar; to conduct, through the present Board of Examiners, which is retained for such purpose, the examination of applicants; to certify to the Supreme Court the names of those found to be qualified; and to formulate rules governing the conduct of persons admitted to practice law.

4. The Commission is also given the power to pass upon and investigate complaints; to take disciplinary action by private or public reprimand, suspension from the practice of the law, or exclusion or disbarment therefrom, provided that all of its actions in reference to exclusion or disbarment must be by a majority vote of the commission and subject to the right of appeal by the accused to the Supreme Court of Alabama. Ample provision is made for representation before the Commission of the accused with all of his constitutional rights as to the conduct of his trial, carefully and amply preserved.

5. The existing statutes relating to suspension and disbarment are left undisturbed and unimpaired, so that, should the Commission fail to properly discipline offending attorneys, the public retains all existing laws.

6. The act requires every member of the State Bar to pay an annual license fee of five dollars into the State treasury to be disbursed by the State Treasurer on the order of the Board of Commissioners. It likewise provides for annual meetings of the Bar, and excludes from the practice all persons not duly admitted and those whose license to practice has expired by disbarment, failure to pay license fees, or otherwise. It imposes no tax or cost upon the state resources other than the five dollars contributed as a license fee by the lawyers themselves.

This act does not represent in its entirety the original thought of this committee. On the contrary, its substance is the result of long study and research made by committees of the American Bar Association, by many state bar associations, of laws in other states, and the comparison of laws now in existence here and elsewhere affecting doctors and other professions, and represents, so far as we know, the unanimous conclusion of all bodies and committees who have given this important subject careful and serious consideration. In our judgment it is democratic, because the members selected to sit upon the Board are elected by the votes of all the lawyers in the respective circuits of the state, and, therefore, fairly represents the profession of law in the State of Alabama. It will make of the Alabama State Bar Association a live, active body composed of all the lawyers of the state, with the opportunity for closer association, better acquaintanceship, mutual assistance, and more intimate knowledge of the needs of the Association and its members. It unifies and brings together all of the lawyers of the state, and brings home to the individual lawyer his responsibility to the profession and provides him with power to discharge his duty. The profession has been scolded and exhorted so long that probably the lawyer would feel neglected if his critics should cease. This bill gives to the profession, for the first time, the opportunity in a practical way to answer the critics, remedy the defects which have been in many cases justly pointed out, and places upon the entire bar the responsibility for its membership.

We earnestly urge the endorsement by this Convention of this proposed legislation.

The Alabama and Oklahoma bills vary only in unessential details from similar drafts already published in the JOURNAL. (*Vid.* Vol. IV, No. 6, for the Ohio and Florida bills introduced in 1921.) The Oklahoma bill was drafted by a committee of which Mr. H. D. Henry of Mangum is chairman. It provides for a board of nine governors, three to come from each of three Criminal Court of Appeals judicial districts.

The first two annual reports of the Committee on Bar Organization submitted to the Conference of Bar Association Delegates have been printed in this JOURNAL. (*Vid.* Vol. IV, No. 3, and Vol. V, No. 2.) The third report contains such an effective statement of the reasons for seeking bar integration that it is presented herewith with only slight omissions. A more complete development of the Chairman's idea for a legislative council in the organized bar will be found in the reprint of his address to the New York State Bar Association, Jan., 1922, in Vol. V, No. 6, of this JOURNAL.

Report of Judge Goodwin's Committee

As the Conference has twice approved the recommendations of its Committee on State Bar Organization, for legislation conferring on the state bars of the various states full powers of self-government, we feel that the scope of this third annual report should be confined to a short statement of the causes which led to such action on the part of the Conference, the suggestion which has since been made for a Bar Council, and the progress made in the several states since the last meeting in the direction of providing means of self-government on the part of the bar and giving it power to function successfully as a body politic. The action taken by this Conference and by many of the constituent bar associations represented here marks, we believe, an epoch in the history of the bar of the country.

The conviction is growing that the bar of a state as a whole must be made conscious of its duty to society, and be given through proper legislation, the power to perform it.

Your committee recognizes that there are conditions in the country which, at the present moment, are causing grave apprehensions in regard to the stability of our social order, and believes that there has been no factor which has been so potent in fomenting discontent, as the feeling that justice is imperfectly administered and often prevented. The knowledge that lawyer criminals through criminal methods give protection to other criminals, and that success in litigation is too often the prize of unscrupulousness, is a most corrupting influence in our national life.

The world has seen all sorts of government successfully administered, but no government has been successful or permanent which did not give assurance of an impartial and efficient administration of justice.

Justice is obviously the foundation of social order; without it nothing is permanent—nothing is stable. Clearly the integrity of the lawyer is as essential to successful judicial administration as the integrity of the judge.

The lawyer's position as a public official requires immunity from inquisition on account of the confidential character of his relation to his client, and freedom from espionage. The position thus assured him puts it in his power, so long as he holds his office, to do evil with practical impunity if he is so disposed, and to defeat the ends of justice, particularly in criminal cases. Subornation of perjury, spiriting away witnesses, and similar crimes may be easily detected, but are almost impossible of proof in criminal prosecutions. We, therefore, emphasize the point that the possession of the office of lawyer gives the power to do wrongs against society which threaten its very foundations.

We can not, however, lessen the privileges of the office, or take away from the safeguards which protect communications between lawyer and client without giving judicial administration a tyrannical aspect inimical to civil liberty. The lawyer must remain free and independent in the exercise of his sacred office and it is, therefore, of paramount importance, that the

character of those who exercise its functions be free from suspicion.

This Conference has already twice recorded its opinion that the conditions referred to require methods of bar government so potent and effective that no one will be able to retain the office of lawyer who cannot continue to demonstrate that his conduct and character are in keeping with the office. We have, by resolutions twice adopted, approved the conclusion, that bar government is an essential to satisfactory judicial administration and the principle that the only just and efficient form of bar government and the only one in harmony with American institutions is self-government, and it has, therefore, recommended, that the bar, as a whole, by appropriate legislation, be made master in its own house and responsible for the conduct of those who compose it.

A Council for Legislation

The fact that the lawyer holds a public office by commission from the state, makes it essential that there be lodged in the entire body power to see that the functions of the office are properly performed, and that in case of obdurate misconduct, the commission be speedily withdrawn.

We do not, in this country, believe in the divine right of even a president or chief justice to retain his office if he be guilty of misconduct, but we are confronted with the fact that the office of lawyer is retained by many whose misconduct is notorious.

The experiment tried here for a hundred and fifty years has shown that the bar cannot be governed effectively through the bench; the experience of centuries elsewhere shows that the bar can, when given power, govern itself and make the word "lawyer" a badge of honor.

The Conference has recommended a Board of Bar Governors, preferably chosen by districts, given full powers of bar government and, through control over funds paid into the state treasury as license fees, the means to carry on activities essential to the welfare of the bar.

To this program your committee respectfully suggests the addition of a Council of the Bar to be composed of the bar governors, the lawyer members of the legislature, the attorney general of the state, and the governor of the state if he be a lawyer, and that the function of this Council be to consider suggestions for the improvement of the administration of justice and changes in methods of bar government.

The thought is inspired by the fact that the lawyers of the legislative and executive branches of the government have through actual experience, in some cases extending over decades, an intimate knowledge of the history of judicial legislation which would make their counsel invaluable in the consideration of any proposal for better judicial administration.

In the past we have in our bar associations taken up such proposals, referred them to committees, discussed them at annual meetings, and finally, sometimes after years of consideration formulated them as bills for legislative enactment, but have been shocked and grieved when the legislature which, of course, has the legal responsibility in the matter, has declined to accept our recommendations without investigation and has been unable to find the time necessary for an independent investigation of its own.

When we have urged that our recommendations be accepted as the representatives of the bar, the legislators have replied by inconsiderately pointing out the fact that we represent only a part of it and when we have at times somewhat tactlessly suggested that we represented the best elements in the bar, the fact has been unpleasantly brought to our consciousness that the majority of the lawyer legislators were not included in our organizations.

But even if we represented the entire bar, we could not, as was suggested at the meeting of the New York State Bar Association in 1922, expect the legislature to take its legislation out of a spoon and, we may add even one held in such competent hands, and it would still be desirable to have conference and counsel among the lawyers chosen to represent the bar and the lawyers chosen to represent the people of the State.

Your committee, therefore, recommend that in any proposal for a self-governing bar, there be included a provision for a Council of the Bar made up in the manner suggested above, but it does not suggest that such Council should have any part in the government of the bar — a function which ought, in its judgment, to be left entirely in the hands of its chosen representatives.

Report of Progress

In addition to the progress reported at the last annual meeting, we beg leave to submit the following:

Idaho. The State Bar Association prepared a bill modeled on the lines recommended by this Conference, and while it submitted it to the legislature too late for action at the 1921 session, it is understood that the Judiciary Committee was generally favorable to its passage.

Michigan. The State Bar Association again endorsed the proposal for a self-governing bar and a bill before the legislature which had passed the Senate.

Colorado. The proposal is on the program of the State Bar Association meeting, but its action will come too late to be included in this report.

Kentucky. The State Bar Association has discussed the proposal, but as yet has taken no action.

Alabama. The Association provided for the appointment of a committee to recommend the enactment of legislation "conferring upon the bar association such powers and responsibility as they may deem advisable in reference to admission to the bar and disbarment therefrom."

South Dakota. The proposal was on the program for consideration at the State Bar Association meeting July 19th and 20th, but its action will come too late to be included in the body of this report.

Oklahoma. The State Bar Association has appointed a commitee to draft an act for the government of the bar and submit it at its next annual meeting.

Florida. The Association approved a draft of a law giving the bar full powers of self-government and appointed a committee to present the matter to the legislature.

This same bill passed the Senate at a former session and the Secretary of the Bar Association adds: "We have every hope that the bill will be passed at the next legislature."

New York. The State Bar Association referred the matter to a committee which is laboring on a bill which includes provisions for a Bar Council as well as the provisions for a Board of Governors, heretofore approved by the Conference. The lawyers of the State appear to look upon the measure as one which will also provide the means for securing a State Bar Building at the capital, a project worthy of serious attention of every State Bar. If the bar is to be recognized as a body politic, then suitable physical means for its functioning is desirable both at the capital and in the court centers at least.

Tennessee. The State Bar Association heard a paper on this subject read at its last annual meeting in May, and while no action was taken, approbation of the idea was freely and quite generally expressed by the members.

Louisiana. Your committee is informally and indirectly advised that the State Bar Association has appointed a committee to prepare a bill providing for a self-governing bar.

Apparently substantial progress is being made and your committee therefore ask that this report be accepted and the committee be continued.

Respectfully submitted,

CLARENCE N. GOODWIN,
Chairman.
Chicago, Ill.

JAMES BYRNE,
New York City.

W. H. H. PIATT,
Kansas City, Mo.

COL. THOMAS W. SHELTON,
Norfolk, Va.

CLEMENT MANLEY,
Winston-Salem, N. C.

SAN FRANCISCO, CALIF.,
August 8, 1922.

Illinois' Great Opportunity

New Constitution Registers Remarkable Progress in Respect to Judiciary —Notable Features of Draft Quoted and Explained

The June, 1922, number of the JOURNAL contained an article on the new Illinois draft constitution, which is to be voted on Dec. 12. The proposed constitution, so far as progress in judicial organization is concerned, makes certain efforts in other states look very feeble. It confers upon the Supreme Court a broad rule-making power. It consolidates the seven courts of record of Cook County, which serve a population of three millions, into a single organization which has but two fixed divisions, one for civil and one for criminal business. The administration of this great metropolitan court is to be through two chief justices, both chosen by the Supreme Court, which is empowered to lay down rules for their guidance.

The work of the convention was not completed until September and at the last opportunity a change of some importance was made in the judiciary article by increasing the Supreme Court from seven to nine justices. This had been a sharply debated question.

It is now possible to present the work of the convention in its final and unalterable form after the conclusion of the work of the committee on phraseology and style. It does not appear profitable, however, to present the entire article, with the accompanying schedule, for this would mean but little to the average reader without liberal annotation and explanation. It seems better to limit quotation and comment to the significant features, thus keeping the article within readable limits. By way of preface it may be well to say that Illinois now has a Supreme Court of seven members, only one of whom is elected in the district which embraces Chicago. There are four appellate court districts with sessions at Chicago, Ottawa, Springfield and Mt. Vernon, the judges of which are selected by the Supreme Court bench. The Supreme Court receives appeals in capital cases directly, but protects itself from inundation on the civil side through certiorari in a manner similar to that employed in the federal court system.

Outside of Cook County, which has nearly half the population of the state, there are seventeen circuits, each having three Circuit Court judges. These judges work together, sharing the responsibilities and equalizing the work in a measure. The plan is probably much better than the one-judge circuit, which is extremely common, and especially better than the one-judge circuit when the circuit is coterminous with the county. This plan is retained and will be a little stronger owing to the fact that Appellate Court appointments, under the new constitution, will not reduce the working force of Circuit Court judges. Outside of Cook County there has been less dissatisfaction with the Circuit Courts than in most states, notwithstanding a very defective system of pleading.

The seven courts consolidated in Cook County are the following:

1. The Circuit Court, with twenty judges.
2. The Superior Court, practically identical in all ways with the Circuit Court, and having also twenty judges.
3. The Criminal Court of Cook County, which has no distinct staff of judges.
4. The Municipal Court of Chicago, which will have a chief justice and thirty-six judges after next month's election.
5. The Probate Court of Cook County, with one judge (and several assistants).

6. The County Court of Cook County.
7. The City Court of Chicago Heights.

The sections of the new constitution which appear to merit special attention, to afford an idea of the proposed changes, are as follows:

THE SUPREME COURT

Section 87. The supreme court shall consist of nine justices, one of whom, to be chosen by themselves, shall be chief justice.

If this method of choosing the chief justice results in longer tenure of the position than under the seniority and rotation plan now in effect, it will serve an excellent purpose.

Section 88. The state shall be divided into seven districts for the election of justices. The district including the county of Cook shall elect three justices, not more than two of whom shall at the time of their respective elections reside in the same county. Each of the other six districts shall elect one justice. Until otherwise provided by law, the seven districts shall remain as at the time of the adoption of this constitution.

This is intended to guarantee Cook County two members of the Court, and no more. Another section makes the term of office ten years.

Section 90. Whenever a quorum of the supreme court certifies to the governor that it is unable to dispose of pending cases with reasonable dispatch because of the death, disability or resignation of any justice, the governor shall designate a judge of one of the appellate courts to act as a justice of the supreme court and receive the salary paid a justice of that court until the vacancy is filled or the supreme court certifies to the governor that the disability is removed. Such designation shall not affect the term of such judge.

This is a feeble way of giving assistance to this important tribunal. It deliberately cuts off the possibility of enlarging the court to meet exigent demands and suggests that there is something very personal about justice that can flow only from a certain specified few. However, like other sections which are criticised, it is fully as good as the old constitution.

Section 91. The supreme court shall sit at the seat of government. A majority of the justices shall constitute a quorum and the concurrence of five shall be necessary for every decision.

The requirement that five justices shall concur in every decision is intended to prevent working in sections and that will probably be its practical result. The objection to this method is that under pressure of business the decisions tend to become the decisions of single justices, and the general participation which is implied is sacrificed in cases deemed less important.

Section 93. The supreme court shall have exclusive power to prescribe rules of pleading, practice and procedure in all courts; but rules not inconsistent therewith may be prescribed respectively by other courts of record. Any rule of pleading, practice or procedure may be set aside by the general assembly by a special law limited to that purpose.

This important section is interesting for its brevity. It protects the trial courts in their accustomed power of making rules of an administrative sort. The legislature is left with a veto power, and this is guarded so that no rule can be set aside by a resolution, by a section of an act devoted to another subject, or by implication.

THE APPELLATE COURTS

Section 96. Each appellate court shall consist of three judges or such multiple of three as the supreme court may from time to time determine. In appellate courts of more than three judges the supreme court may assign the judges thereof to divisions of three judges each. Each division shall select a presiding judge and the presiding judges shall apportion the work of the court among the several divisions and perform such other administrative acts as may be necessary.

This section is interesting in its recognition of the need for an administrative head to apportion and generally supervise the work.

Section 97. Judges of appellate courts shall be appointed by the supreme court. The terms of judges of appellate courts shall be six years. . . . The supreme court for cause shown of record may remove any judge of an appellate court.

The Supreme Court has been designating Appellate Court judges from the Circuits, which, of course, has been very much better than providing additional election districts and asking the scattered electorate to choose their Appellate Court judges. The plan has excluded politics and has worked well except that such selections have necessarily deprived certain circuits of needed trial judges.

It is important to note that there is no feeling that the exercise of the appointive power by the Supreme Court has reacted prejudicially upon that court.

The foregoing section gives no added power to the Supreme Court unless it may be presumed that in occasionally going outside of the trial courts, to the bar, for its selections, it may choose with less wisdom than the electorate would. There will doubtless be appointments from the trial bench and also directly from the bar, but when a vacancy is created in a Circuit by such an appointment, it can be filled and the trial court will not be deprived of a needed judge. The Appellate Court judges sitting at the time of the taking effect of the new constitution will remain for six years.

Opponents on principle of all forms of judicial appointment will criticise Section 97, although it makes but a very slight deviation from long-accustomed practice in Illinois, is sure to remedy one defect and makes it possible for the Supreme Court to pick some exceptionally capable lawyers for these important courts.

Section 98. The appellate courts shall hold such sessions as the supreme court may direct.

This illustrates the disposition of the convention to confirm in the Supreme Court a practical superintendence of matters which are often left to constitutional or statutory provisions that produce serious evils.

Section 100. Appeals from and writs of error to circuit and county courts may be prosecuted in all cases as follows: (a) to or from the supreme court in all criminal cases where the punishment allowed by law may be death or imprisonment in the penitentiary and in cases where a franchise or a freehold or the validity of a statute is involved, (b) to or from the appellate courts in such other cases as may be prescribed by general rule of the supreme court and (c) to or from the supreme court in all other cases. Except as above limited the supreme court by general rule may prescribe the final jurisdiction of appellate courts unless otherwise provided by law.

The provisions for the Circuit Court, as the only general trial court outside of Cook County, present no novel features. The judges are to be elected as at present for terms of six years.

THE METROPOLITAN COURT

Section 12. (Schedule.) On May seventh, nineteen hundred twenty-three, the circuit, superior, criminal, county and probate courts of Cook county, the municipal court of Chicago and the city court of Chicago Heights shall be consolidated into one court to be known as the circuit court of Cook county and thereupon all such courts except that last mentioned shall be abolished. The offices of judge and clerk of the city court of Chicago Heights shall thereupon be abolished.

Section 13. (Schedule.) The judges of the circuit, superior, county and probate courts of Cook county and the chief justice of the municipal court of Chicago in office on May seventh, nineteen hundred twenty-three (except the judges of the circuit and superior courts of Cook county made judges of the appellate court of the first district by the adoption of this constitution whose offices as judges of the circuit and superior courts of Cook county thereby cease to exist) shall be judges of the circuit court of Cook county as thus consolidated and shall continue to hold office during the terms for which they are respectively elected or appointed and until their successors are elected and qualified. The associate judges of the municipal court of Chicago in office on May seventh, nineteen hundred twenty-three, shall be associate judges of the circuit court of Cook county as thus consolidated and shall continue to hold office during the terms for which they are respectively elected or appointed and until the first Monday of June next following, respectively, when their respective offices as associate judges of that court shall be abolished. There shall be elected to the office of judge of the circuit court of Cook county for terms of six years, except as hereinafter otherwise specifically provided, on the first Monday of June of the years following: . . . (Here follow detailed provisions for succession. The office of "associate judge" is to cease as the present incumbents complete their terms, until, at the end of seven years there will be no associate judges in the court. The limitation placed upon the powers of the associate judges appears in the section of the schedule next following.)

Section 14. (Schedule.) Such associate judges of the circuit court of Cook county shall perform such judicial duties as may be assigned to them in the classes of cases which would have been within the jurisdiction of the criminal court of Cook county at the time of the adoption of this constitution and also in the classes of cases arising in the county of Cook which would have been within the jurisdiction of the municipal court of Chicago if they had arisen in the city of Chicago prior to the adoption of this constitution. During their respective terms of office as such associate judges they shall receive the salaries allowed them by the laws in force on May first, nineteen hundred twenty-two, one-half of which shall be payable out of the state treasury and

one-half out of the treasury of the county of Cook.

The theory of the merger is that the associate judges of the Municipal Court of Chicago shall not be benefited as individuals; their salary remains the same; they gain, however, felony jurisdiction so that they can be utilized in a unified criminal court if thereto appointed by the Supreme Court.

Section 16. (Schedule.) The judge of the county court of Cook county in office at the time of the adoption of this constitution shall continue to exercise during his term of office or until otherwise provided by law the same control and supervision over all matters of election as now provided by law. The general assembly prior to July first, nineteen hundred twenty-five, shall provide that all such authority and supervision shall devolve upon some elective county officer or officers.

The Cook County Court judge has the entire control of the election machinery of the county, making the office one of extreme partisan importance. The disposition made of this power is an excellent one and fair to all concerned.

Section 17. (Schedule.) On December third, nineteen hundred twenty-three, the county and probate courts in each county (other than the county of Cook) where both exist shall be consolidated into one court to be known as the county court.

Section 22. (Schedule.) The circuit court of each county is hereby continued and on the first Monday of November, nineteen hundred twenty-seven, the circuit and city courts in each county (other than the county of Cook) where both courts exist shall be consolidated into one court to be known as the circuit court and thereupon the offices of judge and clerk of all such city courts shall be abolished.

The effect of the foregoing sections is to merge Probate Courts in a few of the larger counties with the County Court, and to merge a few City Courts with the Circuit Court, in the interests of symmetry. It will be a considerable gain to the judiciary as a system to get rid of these statutory courts of irregular powers and purposes.

Section 107. Judges of the circuit court of Cook county shall be elected for terms of six years from the date of their election. At all elections for judges the ballots therefor shall be separate and distinct from the ballots for non-judicial officers.

Section 109. The circuit court of Cook county shall sit in the city of Chicago but provision may be made by law for holding sessions in other cities, villages or incorporated towns in the county having a population of at least five thousand whenever suitable facilities for holding court are provided and maintained without expense to the county or state.

Section 109. The supreme court shall establish a civil division and a criminal division of the circuit court of Cook county. The supreme court from time to time shall assign judges to service in the two divisions and shall designate a judge to act as chief justice of each division who shall have such administrative power and authority as may be provided by the supreme court.

If there is to be any division whatsoever in the court system of a large city it should be between civil and criminal jurisdiction. Even then it would not be justifiable without provision for the exchange of judges from one division to another. Otherwise the constitution would lock up some part of the judicial power at times and seriously impede administration.

The unification of the two divisions in this instance is effected through the Supreme Court, which is given practically all of the power to control and hence must carry the responsibility. This does not imply that the justices of the Supreme Court will need to keep in touch with the details of administration. It means that they must appoint chief justices who will be equal to the demands of the positions. Their power to revoke appointments at will and make new ones will meet any exigency that may arise. Their power to lay down general rules for administration will permit of conferring any desired degree of autonomy upon the chief justices. The thing which is most indicated as a check upon these administrators is a provision for departments in each of the two fixed divisions, each with a presiding justice with powers to be defined by the chief justice. That would surround each chief justice with a superintending staff, or cabinet of advisers, greatly assisting in the work of managing.

A big reason for creating the separate criminal division was the success of the criminal court of Detroit and the feeling of Chicago delegates that reform in law enforcement was the biggest problem confronting the convention. Otherwise there

would have been but one chief justice for the entire court. There is no sense in the objection that "it would be too big a job for one man." Success would depend upon the nature of the subdivisions and the relation of the chief justice to members of his council, or cabinet. If a railroad, or a state or a nation can get along with a single executive, a court can.

Objection is made to centering authority in the Supreme Court. There are strong theoretical reasons for preferring to make the community work out its own salvation, which it could surely do under a proper scheme of organization. But success may also be presumed from the plan adopted. Most of the Supreme Court justices will have slight personal knowledge of the stresses which make administration of courts in a metropolis difficult, but the impersonal nature of their control may in itself possess great value. The court can hear what interested persons say, and offer in proof, and then act, and that is precisely what it does in ordinary adjudication.

Section 110. The supreme court may authorize the chief justices of the civil and criminal divisions jointly, by and with the advice and consent of a majority of the judges of the court, to appoint assistants who shall have such judicial or other powers and duties in respect to the business before the court as the supreme court may prescribe. The salaries of such assistants shall be fixed by the county board and paid out of the county treasury.

This section, wisely developed, will be one of the most valuable ever drafted in this field. Expert assistants can do a great deal to relieve judges of their less technical duties. They can do all that is now done by masters in chancery and a great deal more, and the fees which they earn may be made to pay the entire cost of this branch of the service.

Section 111. Electors of the county of Cook equal in number to one-tenth of the total vote cast for president of the county board at the last preceding election may file in the circuit court a petition to submit to a vote the proposition whether the county shall adopt the system hereinafter provided for the appointment of the judges of the circuit court. Thereupon the chief justice of the civil division of that court by an order entered of record shall call a special election for submitting such proposition within three months after such order is entered. If the proposition is approved by a majority of those voting thereon such chief justice shall declare it adopted. If it is disapproved it shall not again be submitted for six years. Upon the adoption of the proposition the judges in office shall continue in office until removed as herein provided. After the adoption of the proposition the manner of choosing judges of that court shall be as follows: The governor shall fill any vacancy in that court by appointment from a list containing the names of not less than four eligible persons for each vacancy, nominated by a majority of the supreme court, not more than one-half of such persons to be affiliated with the same political party. Thereafter each judge shall hold his office during good behavior subject to removal as herein provided. On the first Monday in June in the sixth year after the election or appointment of every judge, or in the seventh year if the sixth is an even numbered year, and on the same date in every sixth year thereafter the electors of the county shall be given an opportunity at an election to express their disapproval of such judge. If a majority of those voting at any such election disapproves of any judge his office shall become vacant at the end of three months after the election and for a period of six years thereafter he shall be ineligible to appointment as a judge of such court; if such judge is not disapproved, he shall continue in office and begin a new term on the day of such election. All elections under this section shall be conducted in the manner prescribed by law.

The foregoing section explains itself. It is the result of two years of earnest crusading among the delegates by Mr. Amos C. Miller, ex-President of the Chicago Bar Association, who led the successful campaign for the re-election of twenty-one Cook County judges in 1921. The provision for the retirement of judges is the product of the fertile brain of the late Albert M. Kales, and has been received with favorable comment in many places.

As to the probability of the plan being adopted one can only guess, but it seems to the writer that the public is much less attached to the principle of electing judges than are the politicians and lawyers. And a postal card vote by Cook County lawyers some time ago showed surprising drift toward appointment.

Section 112. After five years from the adoption of this constitution the general assembly may divide the circuit court into, and the jurisdiction thereof between, two courts both of which shall be governed by the provisions of this article so far as applicable. No act providing therefor shall

become effective until approved by a majority of those voting on the question at a general election in the county of Cook.

This section is inserted to meet the objections raised to the consolidation of the courts, which does away with a horizontal division of jurisdiction and the resulting inferior court.

COUNTY COURTS

Section 113. In each county except the county of Cook there shall be elected in nineteen hundred twenty-seven and every six years thereafter a judge of the county court except that continguous counties may by law be made a district in which one judge shall be elected for all county courts in the district. An additional judge shall be elected for every fifty thousand population or major portion thereof in a county or district above a population of fifty thousand. The term of every county judge shall be six years from the date of his election.

Section 114. In every such county there shall be a county court which shall have (a) original jurisdiction of all matters of probate, guardianship, conservatorship and apprenticeship, the administration and settlement of estates of deceased persons and proceedings for the sale of real estate where required for the administration and settlement of such matters or estates, proceedings relating to taxes and assessments and their collection, and criminal cases below the grade of felony, (b) concurrent jurisdiction with the circuit courts in testamentary trusts, construction of wills and partition of real estate where any such proceeding is incidental to its original jurisdiction, (c) exclusive jurisdiction of appeals from justices of the peace and (d) such other jurisdiction as provided by law.

Section 115. County courts shall always be open for the transaction of business. The court shall sit at the county seat and shall also sit in cities in the county of twenty thousand population or more whenever suitable facilities for holding court are provided and maintained without expense to the county or state.

The County Court is an old landmark in Illinois judicial organization. It has had jurisdiction in civil cases to $1,000, in the trial of misdemeanors and preliminary examination in felonies, and in probate matters. The new draft provides that County Court judges shall not practice law or hold any other office. There will be an increase of salary to offset the losses from not practicing. This will dignify the court and the judgeship.

JUSTICES OF THE PEACE

Section 116. Justices of the peace and constables outside the county of Cook shall be elected or appointed in such towns or districts and such justices of the peace shall have such uniform jurisdiction as provided by law. They shall receive salaries from their respective towns or districts to be fixed by the county board.

Section 117. The chief justice of the civil division of the circuit court of Cook county shall appoint a justice of the peace and a constable in each town or portion of town in the county outside the city of Chicago, each of whom shall hold office for two years unless sooner removed by such chief justice for cause shown of record. An additional justice of the peace and constable may be appointed in every such town or portion of town for every additional ten thousand population therein or major portion thereof above a population of ten thousand. Such justices of the peace shall have the same jurisdiction and such constables shall perform the same duties in the part of the county of Cook outside the city of Chicago as like officials in the rest of the state. The salaries of such justices of the peace and constables shall be fixed by the county board and paid by the county.

Section 118. The offices of justice of the peace and constable or either of them may be abolished or restored in any town or district (or in any town or portion of a town in the county of Cook or in that part of the county of Cook outside the city of Chicago as a whole) by a majority vote of the electors thereof voting on the question as provided by law.

These are believed to be the most advanced provisions concerning minor magistrates that have been written into any constitution in more than a century. As salaried officers they will exist only where needed. They will be subject to control. They may be appointed. A complete reform is accomplished for Cook County, where justices of the peace have in some instances been a scandal. Appointed justices will approximate the fine service rendered in a few of the better suburbs by self-sacrificing lawyers. The only regret is that justices in other counties are not attached to the County Courts as assistants, subject to the direction and control of the County judge.

GENERAL PROVISIONS

Section 121. The general assembly, upon due notice and opportunity for defense and for cause entered upon the journal of each house, may remove any justice or judge upon concurrence in each house of three-fourths of its members elected. All other officers mentioned in this article shall be removed from office on conviction for misdemeanor in office.

Section 122. Provision may be made by rule of the supreme court for the bringing

of actions or proceedings in which a merely declaratory judgment or decree or order is sought and for authorizing the court to make a binding declaration of right whether or not any consequential relief may be claimed.

Section 130. The supreme court may temporarily assign judges of the appellate courts from one district to another and judges of the circuit courts from one circuit to another.

Section 131. If a judge of any circuit or county court is appointed judge of an appellate court, the vacancy so caused in the circuit or county court shall be filled by appointment by the supreme court. The judge so appointed to the circuit or county court shall serve until his successor is elected and qualified.

Section 27. (Schedule.) From and after May seventh, nineteen hundred twenty-three, and until otherwise provided by law, all matters of fees and costs connected with proceedings in the circuit court of Cook county shall be regulated by rules to be adopted by the supreme court.

Judicial Council in Missouri Constitution

Good Provision Respecting Rule-Making Power—Creation of Inferior Courts in Metropolitan Centers Offends Best Experience of Our Times

General adoption of the principle of administrative self-government for courts is on the way, as evidenced by the recent act of Congress relating to United States courts, by the recommendation of the Massachusetts Judicature Commission for a judicial council to supervise the work of the courts of the commonwealth, and more recently still by the judiciary article reported to the Missouri Constitutional Convention by the Committee on Judiciary, of which Mr. J. A. Collett is chairman.

The outstanding feature of that committee's report may be said to be its provision for a council of judges to exercise rule-making and administrative powers. The same powers are conferred by the Illinois draft constitution, referred to elsewhere in this number, but the Supreme Court is made the judicial council in that state.

In the proposed Missouri judiciary article the council is composed of five judges of the Supreme Court, the three presiding judges of the three Courts of Appeals, three judges of the Circuit Court and two judges of the County Court. This representative body is more in keeping with the theory of the judicial council as known in other English speaking jurisdictions. There should be participation in rule-making by judges of all the courts. Under such a plan the judges most interested in such duties, and best qualified, can be selected. And the authority exercised by such a body is the authority of the entire judiciary, not the authority of a single branch.

Before proceeding to a feature of the Missouri draft which must be criticized, let us quote from the report of the Judiciary Committee on this matter of judicial council. The committee say:

Argument for Judicial Council

"Another change made in the judicial code is the creation of a judicial council, which is to be composed of thirteen members—five to be elected from the Supreme Court by that court, three to be the Presiding Judges of the three Courts of Appeals, three to be Circuit Judges to be selected by the Circuit Judges of the State and two to be County Judges selected by the County Judges of the State.

"This Council shall meet at least once a year (and oftener as may be required) at the seat of government. It has the power and it is made its duty to make and promulgate by vote of a majority of its members all the rules of practice and procedure pertaining to courts of record.

It also has the power when the business of the court requires it to, by rule or order, provide for the transfer of cases from one Court of Appeals to another and from one *nisi prius* court to another of concurrent jurisdiction.

"It is believed that the vesting of such power in a judicial council to be composed of the judges of the courts is only an affirmation of the inherent power already possessed by the judiciary to regulate its own procedure, and that by expressly vesting in this council this power the rules of practice can and will be made much more flexible and conducive to the speedy dispatch of the courts' business than under existing conditions.

"The authority given this council to transfer cases from one Court of Appeals to another and from one *nisi prius* court to another of concurrent jurisdiction will result, your committee thinks, in an equalization of the work of the courts and will prevent accumulation and stagnation of business in some courts while other courts are idle and unemployed. Your committee regards this change as a most important one, which, it is believed, will meet the public demand for a more simplified and expeditious administration of justice."

The section which creates the judicial council reads as follows:

Section 31. *Judicial council, powers, duties.* There is hereby created a judicial council consisting of thirteen members who shall be selected by and from the membership of the courts of record of the State as follows: Five judges of the Supreme Court, the three presiding judges of the Courts of Appeals, three judges of the Circuit Court and two judges of the County Court; provided that until the election of County Court Judges, as in this Constitution provided, there shall be five judges of the Circuit Court on said Council. The Judicial Council shall meet at least once annually at the seat of government. It shall have exclusive power and it shall be its duty by a vote of at least a majority of its members to prescribe from time to time the forms and manner of service of writs and all other processes; the mode and manner of framing and filing proceedings and pleadings; of giving notice and serving processes of all kinds; of taking and obtaining evidence; drafting, entering and enrolling orders and judgments; and, generally, to regulate and prescribe by rule the forms for the pleading, practice and procedure to be used in all actions, appeals, motions and proceedings whatsoever in civil and criminal cases in all courts of record in this State, and when and as the business of the courts may require, it may by rule or order provide for the transfer of causes from one court of appeals to another and from one *nisi prius* court to another of concurrent jurisdiction. When and as such forms of practice and procedure shall be prescribed and promulgated by the Judicial Council all laws in conflict therewith shall be and become of no further force and effect. The members of said council shall receive no compensation for their service in addition to that received by them as judges, except they shall be paid their actual expenses in attending the meetings of said council, not exceeding the sum of five cents per mile each way actually traveled in going to and returning from said council and five dollars per day while in attendance.

The committee proposal increases the Supreme Court from seven to nine members, and provides for work in three sections instead of two, as at present. It retains the three Courts of Appeals sitting in St. Louis, Springfield, and Kansas City, but adds to the St. Louis quota. Thus far there is little change, but in the trial courts the draft strikes out boldly on new lines.

The biggest proposal lies in the creation of a County Court which is to have a broad jurisdiction, namely:

Trial of misdemeanors and preliminary examination in felonies.

Civil causes involving not more than $2,000, the Circuit Court having concurrent jurisdiction above $1,000.

Suits involving title to real estate regardless of the value of the property.

Probate matters, juvenile matters (except in cities of 300,000 population) and forcible entry and detainer cases.

The creation of this local court of varied and unusual jurisdiction is presumed to reduce the business of the Circuit Court, and it is provided that the present thirty-eight circuits shall be reduced to fifteen. This does not mean that there shall be a corresponding reduction in the number of Circuit Court judges as their number is left to the legislature, but some reduction is evidently presumed.

Business and Social Tribunals Proposed

Various proposals in respect to both trial and appellate courts were made in the judiciary committee. Judge Ewing Cockrell of Warrensburg offered a novel suggestion of considerable attractiveness, which provided a functional division as the only division of trial jurisdiction. He would have one trial court in every county for the disposition of causes involving money and property claims, and another for the adjudication of divorce, probate, juvenile, domestic relations and criminal causes.

This would mean one court for business interests and one for social interests. The judges of such courts would have the same salary and presumably the same dignity and status. The tendency would be to exalt the judicial functions in which public interests transcend those of individuals, instead of making them incidental to a tribunal which exalts the ordinary contested civil controversy.

It may be that Judge Cockrell's interesting proposal for functional differentiation in every county had something to do with the proposal for the County Court above outlined. If so, the spirit of the proposal was lost and the concrete result is to exalt the tribunals which serve business. To them—the Circuit Courts—are reserved the causes involving the largest money demands, together with the felony cases, which, because of stiff penalties, are traditionally regarded as of great moment.

In the rural counties it is impossible to say that the proposed division of jurisdiction would not work better than the present plan. It might be a considerable improvement. But the committee which framed the proposal, and applied it equally to rural counties and to the city (county) of St. Louis and the county in which Kansas City lies, lacks understanding of the needs of metropolitan districts.

Over thirty per cent of the people of Missouri live in the two largest cities. It is in these cities that the judiciary is most infested with politics and the problems of judicial administration are most difficult. So far as trial courts are concerned the problem before the Constitutional Convention is principally to devise a plan adapted to the large cities and failure to do so is pretty near one hundred per cent failure.

The proposed county court, as applied to St. Louis and Jackson counties, is subject to every objection that applies to the inferior tribunal in the large city.

The real purpose in creating an inferior tribunal in a large city is to get unpopular business out of the court in which the leading judges and lawyers perform their respective functions.

The real reason for this purpose is that lawyers do not thrive on "petty" civil and criminal business, they do not comprehend its vast civic importance and judges do not enjoy labor which keeps them in touch with human wretchedness and weakness.

The plan which we criticize "relieves" the Circuit Court, not only of much odious work, but also of the tremendous responsibility for coping with great public problems. It makes it even more "dignified" and its judgeships more sought after.

Inferior Status Means Inferior Judge

The obverse facts are these: that the court of inferior jurisdiction inevitably becomes inferior in the personnel of its judges and its bar. We mean, *inevitably.*

Lawyers who frame an hierarchy of courts and protect their own interests do so more or less unconsciously. For the most part they have as little knowledge of the importance of the inferior criminal and quasi-criminal branches as of the work itself. Their interest is naturally in the court where they earn their money.

There is far more opportunity for a single unworthy judge to wreck the public interests in an inferior court than in one higher up. No course of appeal will avail in most of the cases which are tried in the inferior court. The finest appellate court system cannot help out a weak, dependent and unfeeling political judge in an inferior court. Only a few of all the people ever have any cases in the higher courts. Can they be expected to form

their ideas of the judiciary system from tribunals they know nothing of, except by hearsay, when they see rottenness in the courts provided for their causes?

The weakness of the inferior court judge is recognized in the term which the constitution makers give him, namely, four years, as against six for the Circuit, eight for the Appeals and ten for the Supreme Court judges. And this short term, with its inferior salary, is enough in itself to spell disaster for a court which has to do its work mainly without the guidance and supervision of a responsible bar.

The inferior court which was projected for Cook county in the first draft of the Illinois revised constitution was, on the whole, less objectionable than the one here discussed, but the judges of the Municipal Court of Chicago, with years of experience in this field, joined in unanimous protest, and convinced the community and the convention that it was unsafe to tolerate any inferior tribunal in a modern judicial system. That protest was published in this JOURNAL, Vol. V, No. 6 (April 1922). It applies fully to the criticized features of the Missouri draft.

A constitutional convention sitting in this year of grace which does not shape a court system adapted to the enforcement of law in metropolitan centers fails in an obvious duty. There are scores of reasons why we do not administer criminal law efficiently, but the chief present defect undoubtedly is too small a percentage of convictions in the large cities. This is due largely to delays, both excusable and inexcusable. Delays account for the failure of the state to secure convictions after magistrates or the grand jury, or both, have found probable cause. The delays are due mainly to having two grades of criminal courts, one for preliminary examination in felony cases, and the other for trial. It is in the alley between these courts that a big percentage of the state's cases go to smash.

If anything ever was proved this theory was proved when Detroit unified its criminal courts, abolished delay, and practically did away with undeserved failures to convict.

In view of Detroit's brilliant success for more than two and one-half years, and the wide publicity given it at a time when law enforcement is one of the most discussed of public topics, it is shamefully provincial of Missouri's delegates to perpetuate a system which never, in any large city, has yielded success, and to ignore the obvious solution, which lies in establishing a separate unified criminal court, as Detroit did, or a unification of all trial courts, as was done for Cook county in the new Illinois constitution.

Making Judges "Responsible"

During discussion of the federal judiciary bill in the Senate a member contrasted the amount of work done by appointed and elected judges to the disadvantage of the former. There is a common fallacy of attributing any difference which may appear at any time and in any jurisdiction to the mode of selection. Without unduly minifying the undoubted differences between appointed and elected judges it may be observed that the long tenure usually associated with appointment is sometimes more responsible for good results than appointment. Length of service goes far to make an acceptable judge out of one who appears in his first years of service to be hardly above mediocrity.

Analyzing just one step further, it should be noted that there may be a great difference between a guaranteed long tenure and an average long tenure interrupted at intervals by elections. In some localities where judges are elected and changes are frequent, due to partisan politics and other factors, an occasional judge will nevertheless hold office longer than the average judge appointed for good behavior. Is this long term of the elected judge, punctuated by political dangers, different in its influence upon judicial behavior from a long term which is free from personal dangers? Does the risk of defeat at the polls impel a judge to work assiduously and keep the dockets

clean, or does it distract his attention and lessen his efficiency?

While the answer to these queries will depend somewhat upon personality, there must be some broad average, and professional opinion as to this is given in the following quotation from an editorial in Law Notes for May, 1922:

"As a matter of everyday experience and observation few attorneys believe that the judges are spurred to activity by the reflection that the likelihood of re-election will be increased if a good showing of volume of business dispatched annually can be made before the voters. That is something as to which the voters neither know nor care. The judge who is so unfortunate as to be compelled by his sense of duty to render an unpopular decision sometimes suffers for it, but aside from that the quality and quantity of his judicial work has little or no effect on the vote cast for him. That, of course, is the great defect of the elective system of choosing judges. Undoubtedly in every jurisdiction there are judges who are indolent and procrastinating, just as there are lawyers whose briefs are never served in time and whose cases are never ready for trial. But 'responsibility to the people' under the prevailing system of popular elections will never cure that fault. The best remedy so far suggested seems to lie in the organization of the bench so as to give some measure of supervision over the work of individuals, a system which has met the approval of most students of the problem of reform in procedure. Where the bench is so organized that the results obtained by each judge, both as to the state of the calendar and the percentage of reversals, are known to all its members, and there is some opportunity for an interchange of views as to methods—in other words, when the bench approaches its work as an organization and not as a number of isolated individuals—practically every member of the court will tend to approximate the results achieved by the most efficient members. This has been the result of organization and co-ordination of judicial work wherever it has been tried. And with such a system, whereby judges improve by experience, the life tenure will become an aid to the efficient conduct of judicial work and not a possible incentive to lassitude therein."

Grand Jury Called Worse Than Useless in England

One of the war time economies in England was a suspension of grand jury procedure. Resumption of the ancient practice brought forth pointed criticisms and protests. England's difficulty concerning the grand jury today is similar to that experienced by the makers of Illinois' constitution in 1870. There was a strong fight for abolishing the grand jury, for it was seen then that it could not possibly be of any use to either state or accused in ninety-nine per cent of felony cases. But the need for it in the hundredth case led to an absurd compromise which retained the system until such time as the legislature might abolish it in all cases. Reform became impossible.

England's way out is simple in the absence of a written constitution, for it is necessary only to preserve the grand jury for cases which appear to offer it scope, as when there is public scandal or conspiracy. In all other cases prosecution should be on information.

Doubtless such a sensible plan will be adopted before long, because the absurdity of the grand jury as a compulsory feature of every felony case was demonstrated during the operation of the suspension act, and is well voiced in the following quotation from *The Law Times,* London (Jan. 7, 1922):

"By Order in Council made last month the Grand Juries (Suspension) Act, 1917, came to an end, and during the present year and thereafter, if no steps are taken by Parliament, this obsolete method of wasting time and money will again form part of our criminal procedure. Since 1917 we have heard no suggestion of any miscarriage of justice due to the suspension of the functions of grand juries, but we have heard of the saving of much time and money due to their temporary disappearance. His Honor, Judge Greenwell,

is reported to have said at Durham Quarter Sessions that the sole use of grand juries was to enable a guilty person to escape without a trial—a somewhat severe comment, and not very far from the truth. We know that the charge to the grand jury is not altogether distasteful to some of those who are called upon to preside at assizes and quarter sessions, but in these times when rigid economy in every department is essential the expense incurred, which runs into many thousands of pounds, and the inconvenience caused to grand jurors and witnesses are not justified by the retention of a system that has no practical advantage whatsoever."

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American Judicature Society

To Promote the Efficient Administration of Justice

31 W. Lake St., CHICAGO, ILL.

Directors and Officers

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Journal
of the
American Judicature Society

To Promote the Efficient Administration of Justice

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Discourage litigation . . . Persuade your neighbors to compromise whenever you can . . . Point out to them how the nominal winner is often the real loser—in fees, expenses and waste of time . . . As a peacemaker the lawyer has a superior opportunity.

—*Abraham Lincoln*

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LIST OF PUBLICATIONS

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Bulletin IV-A—Second draft of so much of the Metropolitan Court Act as relates to the Selection and Retirement of Judges. This applies in large part to courts outside of large cities. Pp. 127.

Bulletin IV-B—Second draft of Metropolitan Court Act. Court organization for large cities. Pp. 94.

Bulletin VI—Organization of Courts, by Roscoe Pound; Methods of Selecting and Retiring Judges, by Albert M. Kales; Local Courts of Limited Jurisdiction (for rural counties), by Herbert Harley. Pp. 68.

Bulletin VII-A—Revised draft of a State-wide Judicature Act. A plan for a unified state court system extending from the Supreme Court to the Justice of the Peace. Pp. 198.

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Bulletin XV—Conciliation and Informal Procedure, with model acts. Pp. 32.

The Municipal Court of Chicago, historical and descriptive. PP. 43.

The Struggle for Integration

Bills to integrate the bar will be introduced in a number of legislatures early in 1923. This is as it should be. These bills will create issues and legislative struggles will ensue. It is to be hoped that the associations sponsoring these bills will be victorious, but even if all should fail, still a great deal of good will be done.

The widespread interest in the organization of the bar is indicative of a new spirit in the profession. A sense of solidarity is being evolved. Heretofore the responsible element of the bar has been satisfied with a laissez faire philosophy and the irresponsible minority has traded on the immunity thus conferred.

The feeling is growing now that the profession cannot afford to continue partly decent and partly rotten. It has got to clean house and the cleaning must start on the inside. If there is validity in the ideas for organization now current (and they have worked in every other country) and if the profession has enough spirit to fight the thing through, there can be no doubt as to the outcome of the struggle.

Success is not likely to come, in most states, without a fight. This idea of bar integration is so unlike accustomed facts that it tends at the outset to provoke hostility. Most of the staunchest supporters of the idea were at first in opposition. Rarely does one find an idea which has to make its way against such instant opposition and yet succeeds in convincing practically all sincere investigators.

It will be a salutary experience for the bar associations to rally their strength in a fight for the integration of the profession. Their members need to exert themselves for the welfare of the profession and the public. In being forced to think upon the issues involved they will come to have a better understanding of the position the legal profession should hold as a body corporate existing for the holy mission of administering justice. The practice of the law is essentially a public service and it can become, as it should, the most honored and trusted of the professions. To that end all lawyers who have a pride in their work should strive to win for the bar an organization which will permit it to work out its own salvation. Success may not come at first, but if the profession has enough self-respecting and public spirited members to deserve success, it will be won in due time, and the effort to advance that time will itself go far to create the substantial benefits which are sought.

Introducing Nine New Directors

The board of directors of the American Judicature Society has recently been increased from ten to nineteen members. This permits of making it more representative. The new members, taken alphabetically, are:

Dean Henry M. Bates, of the University of Michigan Law School, who has proved, over a long period, his fitness to head one of the oldest and one of the most progressive centers of legal scholarship.

Charles A. Boston, of the firm of Hornblower, Miller and Garrison, New York City. Mr. Boston is one of the originators of the Legal Ethics Clinic, instituted by the New York County Lawyers' Association, and has been chairman of the committee from the beginning. He is at present also chairman of the Conference of Bar Association Delegates.

Charles S. Cushing, of the San Francisco law firm of Cushing and Cushing, who is pre-eminent among Pacific Coast practitioners.

Walter F. Dodd, of the Chicago Bar, who is an authority on constitutional and administrative law and author of the recently published work entitled State Government.

Augustus R. Hatton, Professor of Political Science in Western Reserve Uni-

versify. Dr. Hatton has filled a unique role as field secretary for the National Municipal League, assisting in scores of cities to draft commission-manager charters. He has also counselled constitutional conventions and legislatures and is entitled to a large share of credit for the better organization of municipal government.

William Draper Lewis, of the Philadelphia Bar, was formerly dean of the University of Pennsylvania Law School. His enthusiasm for higher educational standards was a powerful factor in bringing about the movement now on foot throughout the country.

Amos C. Millar, former president of the Chicago Bar Association, headed the committee of that body which, in 1921, succeeded in securing the re-election of twenty judges who were slated for retirement by a predaceous political gang. His address concerning this triumph was published in the JOURNAL for August, 1921.

Reginald Heber Smith, of the Boston Bar, is the author of Justice and the Poor, the book which followed a nation-wide investigation and became the cornerstone of the movement for legal aid through professional sources and for improved procedure for small claims.

Major Edgar B. Tolman, former president of the Chicago Bar Association, succeeded the late Stephen S. Gregory as editor of the American Bar Association Journal. Major Tolman has long been an advocate of scientific procedure. His success as editor has made the entire profession of law his debtor.

The American Law Institute

The Juristic Center movement which originated in the American Law School Association, and was referred to in this Journal (Vol. V, No. 6) has made a notable progress during the past year. A Committee on the Establishment of a Permanent Organization for the Improvement of the Law was formed from representatives of the bench, the bar and the legal teaching profession, with Mr. Elihu Root as chairman and Dr. William Draper Lewis as secretary. This committee has thoroughly canvassed the opportunity for improving the law, especially in lessening uncertainty and complexity, and has drafted its report.

The report will be presented to a representative gathering of lawyers, judges and teachers to be held in Washington on February 23. There will be present representatives of the supreme and appellate courts of the state and nation, presidents of the leading bar associations, deans of law schools and representative practitioners. The matters presented in the report will be debated and settled and an organization will be created, probably under the title of The American Law Institute.

The work to be undertaken presumably will involve what is best described as a "restatement" of the law with respect to subjects which suffer most from uncertainty and complexity. The product will bear no resemblance to an encyclopaedia or a digest. Nor will it be a formal code. The work will be more like Jenk's Digest of the Laws of England than any other work, but will be based on a wider authorship and criticism, and will not purport to cover the entire law. Probably several years will be required to dispose of a few topics. It is anticipated that the work will recommend itself to the practicing lawyer and to the judge to the end that one will quote it as authority and the other will rely upon it. So may its unifying and clarifying influence gradually improve the texture of our law.

The projected work will emphatically not be a book-selling venture. It will be a united attempt on the part of bench and bar to cope with defects inherent in a system of law woven on three score looms. It should make a powerful appeal to the good sense and the imagination of every person who is interested in the growth of law.

Conciliation Law Held Valid

North Dakota Supreme Court Sustains Act Which Established Conciliation for Small Controversies, In Notable Decision

By the enactment of 1921 the state of North Dakota blazed the way in conciliation procedure as applied to an entire state. That act has recently been held valid by the state Supreme Court in the case of Klein v. Hutton (September, 1922 term), which was brought as a test case. The decision is a very important one in every respect as it will doubtless assist materially in the adoption of conciliation in some form or other generally throughout the country as a solution of the problem of administering justice in small controversies.

The success of conciliation under the auspices of a successful city court was demonstrated first in Cleveland and then in Minneapolis and other Minnesota cities. The modern unified city court makes it an easy matter to apply principles of conciliation to causes involving small amounts. A trusted and disinterested judge finds it easy to guide litigants to substantial justice at a cost which the traffic can stand.

But rural folk must have different machinery. This was worked out in the North Dakota act which requires district judges to appoint conciliators at convenient points in each county. The operation is under the control of the district judges throughout. The act is published herewith as a basis for consideration of the constitutional questions involved.

North Dakota Conciliation Law

An Act to Provide for Conciliation of Controversies and to Repeal Sections 9187, 9188, 9189, 9190, 9191 and 9192 of the Compiled Laws of North Dakota, 1913.

Be It Enacted by the Legislative Assembly of the State of North Dakota:

1. CONCILIATION BOARDS CREATED. It shall be the duty of District Court Judges to establish a Conciliation Board in each county of their respective districts within ninety days from the taking effect of this act. Each such Conciliation Board shall consist of such number of Conciliators as the District Court Judge of such county shall determine and he shall have power to increase the number thereof and to remove Conciliators at his pleasure, but at no time shall there be less than six members nor more than twelve members on any such board. These members shall not include the County Court Judge, who shall be an ex-officio member of the Conciliation Board for his county.

2. ELIGIBILITY AND COMPENSATION. Every person having the qualifications of a voter shall be eligible for appointment as Conciliator for the county in which he resides. Any member of the bar who acts as Conciliator shall not thereafter appear, in any subsequent proceeding, on behalf of either party to any controversy submitted to him as Conciliator. The moving party to any controversy shall pay to the Conciliator a summons fee of twenty-five cents in all cases involving a sum of ten dollars or less, and fifty cents in cases involving a sum of over ten dollars. In every case where conciliation is effected the acting Conciliator shall be entitled to receive for his services the sum of one dollar where the amount of controversy is ten dollars or less, and two dollars where the amount is over ten dollars and less than one hundred dollars, and two per centum of the amount involved where the amount is over one hundred dollars; said amounts to be assessed against either party, or part against each, at the discretion of the Conciliator. Provided; that when two or more Conciliators participate in a hearing a like fee shall be paid to each of them.

3. APPOINTMENT AND OATH. Conciliators shall be appointed and removed by order of the District Court judges for the counties in which they reside, entered upon the docket of the district for each county. Within ten days

from the date of their appointment, and before entering upon the discharge of their duties, they shall take an oath of office prescribed by the judge appointing them.

4. ORGANIZATION. The District Court judge shall be chairman ex-officio of the Conciliation Board in each county of his district. He shall call such meetings of Conciliators as he shall deem proper, preside over such meetings and instruct Conciliators in respect to their duties. Upon his request any such Conciliator shall make report to him in writing of his official acts.

5. CONCILIATION PROCEEDINGS PREREQUISITE TO PROCESS. After the expiration of said ninety days no process shall be issued in commencement of a civil suit by any justice of the peace or by any other trial court unless the moving party shall file in court a certificate of a Conciliator showing that an attempt has been made to effect a settlement of the claim and that such attempt has failed; but the foregoing shall not apply to actions known as provisional or remedial remedies, actions involving title to or possession of real estate and suits involving over $200. Provided, however, that any District Court Judge in chambers may in a particular instance, on a proper showing, direct the issuance of any such process in any trial court without recourse to conciliation proceedings.

6. APPLICATION FOR CONCILIATION. Any person presuming to have any civil claim not specified as an exception in Section 5, before commencing suit, shall request one of the Conciliators for the county in which he resides, or in which the person complaining [complained of] resides, to act as Conciliator. Thereupon such Conciliator, if qualified and able to act, shall summon by letter or telephone or personally the party complained of to appear before him at a certain time. Upon the hour set for such conciliation hearing, if the parties are present, it shall be the duty of the Conciliator to hear the parties and their witnesses and to endeavor to effect an amicable settlement of the controversy agreeable to law and equity. Conciliators may, in their discretion, administer oaths and require statements under oath. They shall make no record of the evidence adduced, and no parts of the proceedings shall be admitted as evidence, or considered at the trial of the case, and no Conciliator shall be competent as a witness in respect thereto in any subsequent proceeding.

7. CHANGE OF VENUE. At the time of the first hearing and before proof has been submitted by any party, the parties may by mutual agreement elect to submit their controversy to another Conciliator than the one first selected; and in such case the first Conciliator shall dismiss the proceedings and make no record of [or] report thereof.

8. CONTINUANCES. Conciliators shall have power to continue their hearings from time to time to meet the convenience of the parties.

9. CONCILIATORS MAY SIT TOGETHER. Conciliators shall have power to request the assistance of other Conciliators of their county in any conciliation proceedings, and in case two or more Conciliators officiate in respect to any controversy any one of them may certify the proceedings on behalf of all.

10. CONCILIATORS NOT OBLIGED TO SERVE. No Conciliator is obliged to act in any given controversy, and shall not act if he has any interest in the controversy or is a member of the immediate family of either of the parties, unless consent is given. In case no Conciliator convenient to the moving party is obtainable, then the County Judge of that county shall act as Conciliator.

11. CONCILIATOR'S REPORT. In every case in which a Conciliator shall serve he shall forthwith certify to the District Court for his county the terms of the agreement, if any be effected. The report shall describe the claimant's demand and embody the terms of settlement, bearing the signatures of the parties. It shall be entered upon the docket of the District Court and thenceforth shall have the full force and effect of a judgment of the said court, but shall be subject to any terms concerning its satisfaction which the parties shall have agreed upon, and subject to the lawful orders of the judge for such District Court.

12. FAILURE TO AGREE. In case the party complained of shall fail to appear at the conciliation hearing or for any other reason there shall be no settlement of the controversy by agreement of

the parties, then the Conciliator shall give to either or both parties, upon request, his certificate to the effect that an attempt has been made in good faith by the moving party to effect a settlement of a controversy, which shall be concisely described, and that the attempt has failed.

13. PERSONAL APPEARANCE. The parties to all conciliation proceedings shall appear in person, except that, for good cause shown, the Conciliator may permit a party to be represented by another person, not a member of the bar. In order to be so represented the party unable to appear shall authorize his representative to appear and act for him in effecting a settlement of the controversy by agreement, or by arbitration, if the representative shall so elect, and shall be bound by the acts of his representative the same as if he were present in person.

14. ARBITRATION BY CONCILIATOR. Whenever both parties shall agree in writing to submit their controversy to a Conciliator for his determination as arbitrator, the Conciliator shall receive the evidence and within five days make his award, which award shall be filed in the District Court for that county and be entered upon the docket as a judgment by award and shall have the full force and effect of a judgment of such Court.

15. REPEAL. Sections 9187, 9188, 9189, 9190, 9191 and 9192 of the Compiled Laws of North Dakota, 1913, are hereby repealed.

Approved March 10, 1921.

Supreme Court Opinion Sustaining the Act

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

E. B. Klein,
Plaintiff and Appellant.
vs.
W. H. Hutton,
Defendant and Respondent.

An appeal from the District Court of Burleigh County, W. L. Nuessle, Judge.

(1) Chapter 38 of the Session Laws of 1921, which provides for the conciliation of controversies, where the amount involved is $200 or less, is a valid enactment and in no manner contravenes, as contended, certain provisions of the Constitution of the United States or of the State of North Dakota. The appellant claimed that the act was invalid as contravening some of the provisions of the Constitution of the United States and many of the provisions of the State constitution. The grounds on which the unconstitutionality of the statute is asserted are so numerous that it would be impracticable to state them all in a syllabus. In the opinion they are fully analyzed and decision made of them.

(Syllabus by the court.)

Opinion of the court by Grace, J.

JUDGMENT AFFIRMED.

Messrs. Zuger & Tillotson, Bismarck, N. D., Attorneys for Respondent.

M. Theo. Koffel, Bismarck, N. D., and R. C. Morton of Carrington, N. D., Attorneys for Appellant.

John H. Wigmore, of Counsel, Chicago, Ill., for the American Judicature Society, and Albert Kocourek, of Chicago, Ill., Amici Curiae.

Grace, J.

This is an appeal from a judgment and for costs and disbursements. It will be conducive to a clear comprehension of the issues involved to set forth a concise statement of the material facts necessary to be stated: On the 6th day of December, 1920 at Bismarck, North Dakota, the defendant executed and delivered to plaintiff, his promissory note of that date in the sum of $60, bearing interest at 10% per annum, and due on demand. Demand for payment of the note was duly made. No payment was made, except the sum of $2. At the time the action was commenced plaintiff was the owner and holder of the note.

At the time of commencement of the action there was a duly appointed, qualified, acting conciliation board within and for the County of Burleigh, State of North Dakota, which was appointed by virtue of the provisions of Chapter 38, of the Session Laws of 1921, which repealed Sections 9187-9188-9189-9190-9191 and 9192 of the Compiled Laws of North Dakota for 1913. The plaintiff before commencement of this action did not file in any court certificate of a conciliator, showing any attempt to effect a settlement of the claim upon which the action is brought. He made no attempt to have his claim submitted to conciliation. In the action no provisional or ancillary

remedy was sought nor was there involved therein title or possesison of real estate; nor has any district judge directed the issuance of process therein without recourse to conciliation proceedings. There are no other material facts.

The complaint is in the ordinary form in such cases before the passage of the Conciliation Act. In substance the defense set forth in the answer is; that at the time of the commencement of the action, there was a duly appointed, qualified and acting conciliation board within and for the County of Burleigh, as provided for under Chapter 38 of the Session Laws of 1921, referred to in the answer as Senate Bill No. 158 of the 17th Legislative Assembly; that plaintiff before the commencement of the action did not file in any court a certificate of a conciliator, showing an attempt to effect a settlement of the claim upon which the action is founded; that such attempt has failed; that the action is not one in which a provisional or ancillary remedy is sought; that it does not involve title or possession of real estate, and, that no district judge directed the issuance of any process in the action without recourse to conciliation proceedings.

Were it not that the ultimate issues, and innovation in the administration of justice, provided for in the act in the kind of controversies to which it relates, concerns not only the social welfare of the citizens of this state, but indirectly may concern the welfare of the citizens of other states of the Union, should such other states or any of them at some future time see fit to follow the example of North Dakota in the enactment of a Conciliation Act, the first of the states to establish a state wide tribunal of conciliation, the case would be of minor importance, but in the circumstances the case is manifestly one of unusual public interest. The case has been ably briefed by the counsel of both parties, and especially able and helpful is the brief filed by Honorable John Wigmore of Counsel, author of the well known work on Evidence, which bears his name, who, from public interest, appeared on behalf of the American Judicature Society, and Herbert Harley and Albert Kocourek, who appear as Amici Curiae, and whose participation is also from public interest.

The manifest purpose of the Act, is to facilitate, regulate and encourage a voluntary adjustment of matters which otherwise would or may become the subject of legal controversies, where such amount does not exceed $200, and to provide a means to accomplish that end, the use of which will not necessitate invoking the powers and functions of the ordinary and regularly constituted courts of justice. Perhaps in this state from one-third to one-half of all civil causes involve not to exceed $200, any of which may be litigated from the lowest to the highest court, many of which in fact are so litigated, and which, had just a little common sense been applied to the facts by the litigants, would not have resulted in litigation. Neither is it an unreasonable statement that the expenses of such litigation to the parties concerned will approximate the amount involved therein. However, the monetary loss in this class of litigation is not the full measure of the whole loss; to ascertain the whole loss, there must be included loss of time, for time is of great value; if it were possible to get an accounting of all the time consumed or lost by litigants in this state in all actions involving not more than $200, plus the loss of time by all witnesses, and that were applied to production of what may be termed necessities of life, the amount of such production and its value would be astounding. In addition to this, every law suit is a miniature war, in which the respective combatants are bringing into action, all their ingenuity, energy and resourcefulness for the purpose of acquiring victory, and like war, when the battle is ended there still remains in the breasts of the participants, a certain amount of resentment against their late adversaries. The principle of encouraging private adjustments of legal controversies embodied in the Act was in all probability derived from the laws of Norway and Denmark, where a conciliation system has been in use since 1797. Many thousands of citizens of each of those countries later became citizens of our country, and of our state in particular, constituting therein a great body of our most respected citizenship, now, as at the time of the adoption of our constitution.

The purpose of the Act being praiseworthy, seeking to maintain amicability

between those who otherwise might be compelled to resort to expensive litigations over claims within the amount specified by the Act, it should be sustained unless its provisions are inhibited by the fundamental law of the United States or of this State. That the act in various respects and for various reasons contravenes in certain respects, the Constitution of the United States and that of the State of North Dakota is the contention of the appellant. Appellant's contentions challenging the validity of the Act are eight in number; each will be considered in the order adopted in appellant's brief.

Point "1"

Appellant contends that the Act is unconstitutional and contravenes Section 61 of the Constitution of North Dakota, in that its title is defective. The title of the Act reads thus: "An Act to Provide for Conciliation of Controversies and to Repeal Sections 9187, 9188, 9189, 9190, 9191 and 9192 of the Compiled Laws of North Dakota for 1913." The provisions of Section 61 of the Constitution are as follows: "No bill shall embrace more than one subject, which shall be expressed in its title, but a bill which violates this provision shall be invalidated thereby, only as to so much thereof as shall not be so expressed."

The subject of the bill which became Chapter 38, is Conciliation of Controversies, that is, the subject matter or object of the bill is conciliation of controversies. It is evident that there could be no conciliation of controversies, unless there were a tribunal, conciliation board, or a conciliator or conciliators with powers to be exercised in a definite territory, and before whom such controversies could be taken for conciliation; it is also clear, that in order for the tribunal or board to properly function, some form of organization would necessarily have to be provided and the powers and duties of the conciliators or a conciliator defined and his or their compensation fixed. Again, in order for the Board of Conciliation or the conciliators to function and to accomplish the purpose intended, there would need to be some method of procedure prescribed through which proceedings might be brought before them. A proper bill for the conciliation of controversies would designate some authority empowered to establish a conciliation board in a definite territory. It would specify a means of designating conciliators and their number, their eligibility, compensation, and in what manner they should qualify before entering upon the discharge of their duties, the extent of their jurisdiction and any limitations of it; provide for conciliation proceedings, as a prerequisite to process and provide for the repeal of other laws or sections of other laws in conflict with the Act. All of these matters would be germane to the organization, jurisdiction and procedure of a tribunal or board, created for the conciliation of controversies. The bill under consideration contains all these essential matters or things and perhaps more of similar import to which specific reference has not been made. It consists of 15 sections, all of which are germane to the organization, jurisdiction and procedure of the tribunal or board for the conciliation of controversies created by the Act. In short, the whole subject matter of the bill relates to the conciliation of controversies. The subject of the bill is expressed in the title. The bill is valid and does not contravene the provisions of Section 61. State vs. Woodmansee, 1 N. D. 246; State vs. Haas, 2 N. D. 202; Martin vs. Tyler, 60 N. W. 392; Bye vs. Stafford, 4 N. D. 304; State vs. North Dakota Children's Home Society, 10 N. D. 493; State Finance Co. vs. Mather, 15 N. D. 386; Powers Elevator Vo. vs. Pottner, 16 N. D. 581; State vs. Minneapolis & Northern Elevator Co., 17 N. D. 23; State vs. Blaisdell, 18 N. D. 55; State vs. Peake, 18 N. D. 101; McKone vs City of Fargo, 24 N. D. 53; 138 N. W. 967; State vs. McGillic, 25 N. D. 27, 141 N. W. 82; State vs. Turner, 37 N. D. 635; State vs. Brown, 38 N. D. 340. 165 N. W. 520; Brown vs. Steckler, 168 N. W. 670; State vs. Hagen 175 N. W. 372; Herrmann vs. Mobile County (Ala.) 80 So. 112; Reese vs. State (Ala.) 78 So. 461; Henry vs. State ex. rel. Welch (Ala.) 76 So. 417; Lonshore vs. State ex. rel. Kroell (Ala.) 76 So. 33; Park vs. Pacific Fire Extinguisher Co. (Cal.) 173 Pac. 615; Anderson vs. Board of Com'rs (Col.) 189 Pac. 294; In re School Code of 1919, 108 Atl. 39; Rushton vs. State (Fla.) 78 So. 345; Crowell vs. Akin (Ga.) 108 S. E.

791; Crawley vs. State (Ga.) 102 S. E. 898; B. & O. Ry. Co. vs. Town of Whiting, 161 Ind. 229; Stewart vs. Brady (Ill.) 300 Ill. 425; 133 N. E. 310; Mitchell vs. Lowden, 123 N. E. 566; People ex. rel. Gash vs. Sweitzer, 282 Ill. 171; People ex. rel. Fitzgerald vs. Stitt, 280 Ill. 553; State Board of Charities and Corrections vs. Combs (Ky.) 237 S. W. 33; McGregor vs. Allen, 33 La Ann 870; Sunderlin vs. Board of Supervisors of Iona City, 119 Mich. 535; Giller vs. McCarthy, 34 Minn. 318, 25 N. W. 637; State vs. Women's and Childrens Hospital Ass'n (Minn.) 184 N. W. 1022; Payne vs. Mahon, 44 N. J. L.; Hayes vs. City of Hoboken (N. J.) 108 Atl. 868; State ex. rel. D'Alton vs. Ritchie, 119 N. E. 124; Couch vs. State (Tenn.) 203 S. W. 831; Jackson vs. Bell (Tenn.) 226 S. W. 207; State vs. McCornish (Utah) 201 Pac. 637; City of Richmond vs. Pace (Va.) 103 S. E. 647; Traveler's Insurance Co. vs. Township of Oswego (C. C. A 8th Cir.) 59 Fed. 58; Daley vs. Beery (N. D.) 178 N. W. 104, —N. D.—; Wilson vs. Fargo (N. D.) 186 N. W. 263; State ex. rel. Board of Education of Devils Lake vs. County Auditor (N. D.)— N. D.—, —N. W.—.

Point "2"

It is contended that appellant was denied the right of trial by jury secured by Section 7 of the State Constitution, which provides so far as material here: "The right of trial by jury shall be secured to all, and remain inviolate." Section 5 of the Act provides: "After the expiration of said ninety days, no process shall be issued in commencement of a civil suit by any Justice of the Peace or by any other trial court unless the moving party shall file in court, a certificate of a conciliator showing that an attempt has been made to effect a settlement of the claim and that such attempt has failed; but the foregoing shall not apply to actions known as provisional or remedial remedies. actions involving title to or possession of real estate and suits involving over $200. Provided, however, that any District Court Judge in chambers may in a particular instance, on a proper showing, direct the issuance of any such process in any trial court without recourse to conciliation proceedings."

Section 6 deals with the application for a conciliation and the notice to be given by the conciliator to the party complained of and of the requirement of the party to appear before the conciliator. Section 12 provides: "In case the party complained of shall fail to appear at the conciliation hearing or for any other reason there shall be no settlement of the controversy by agreement of the parties, then the conciliator shall give to either or both parties, upon request, his certificate to the effect that an attempt had been made in good faith by the moving party to effect a settlement of the controversy, which shall be concisely described, and that the attempt has failed."

The meaning of these sections, as we view them, is simply this: that no action involving $200, or less shall be commenced in any court, unless it come within some of the exceptions specified in the act, until the moving party, that is, the party who claims to recover, first shall have complied with the provisions of the act, and has received a certificate of the conciliator to the effect that an attempt had been made in good faith to effect a settlement of the controversy but that such attempt has failed. The certificate may be given to either or both parties. It is clear from the language of the act that after the procuring of such certificate by either or both of the parties, process may be issued, actions maintained and the right of jury trial obtained by the parties or by either of them in the same manner as before the enactment of the conciliation act hence the right of jury trial is not denied. The right of "trial by jury," as that term is used in Section 7 of the constitution means a trial in court whether that court be a court of record or one not of record. A Conciliation Board such as is provided for under Section 120 of the constitution is not a court; it is a tribunal, a board, a table of peace where those who have certain kinds of controversies are invited to sit; this tribunal possesses none of the attributes of a court. There are various kinds of courts with varying powers and jurisdiction. Courts have the power in a greater or lesser degree of issuing process. Their power in this respect is derived from fundamental law, statutory law, enacted in pursuance of fundamental law, the common law, and

their own inherent powers. Black, in his dictionary in defining process, uses the following language, after giving limited definitions of it: "But in its more comprehensive signification it includes not only the writ of summons, but all other writs which may be issued during the progress of an action. Those writs which are used to carry the judgments of the courts into effect, and which are termed 'writs of execution,' are also commonly denominated 'final process' because they usually issue at the end of a suit."

Courts, in addition to the power of issuing process have the right to hear, determine and decide legal controversies presented before them. Where any of these powers is lacking there is no court. The Board of Conciliation or any conciliator has not the power of issuing process. Upon an application for conciliation made, there is no power to issue process compelling the person against whom the claim is, to appear before the board or a conciliator. All the conciliator may do is to inform the party complained of by letter, telephone or personally, to appear before him at a certain time; but, if he does not appear, all the conciliator can do is to certify to that fact and to such facts as under Section 12 may be properly included in this certificate. He cannot determine nor decide the controversy, if there is objection by either party, as a court could. He may hear the controversy if both parties appear for the purpose of affecting an amicable settlement between them where they agree in writing to submit their controversy to him; and when so authorized he may make an award. His power to make the award is derived through the written consent of the parties, while a court acquires its jurisdiction of the parties through process which it may lawfully issue. The conciliator exercises what may be termed his good offices not judicially, but in the manner prescribed by law in order to effect a settlement of the controversy, while a court proceeds by process and determines and decides the controversy regardless of the consent of the parties but through and by the exercise of judicial power.

Points "3" and "4"

It is contended that the act violates Section 13 of the Constitution of the State of North Dakota, and Articles 5 and 14 of the amendments to the Constitution of the United States. Section 13 relates to due process in criminal prosecutions. It defines certain rights possessed by one charged with the commission of the crime. It has no application here as this matter is a conciliation proceeding, relating to a promissory note. As to the Fifth Amendment of the Federal Constitution, it is sufficient to say that defendant may not invoke it. It is, we believe, quite firmly established by the decisions of the Federal Supreme Court, that the Fifth Amendment is a limitation of power of the Federal Government, and not of the power of the States. The proceeding here is one before a board of conciliation, or before a conciliator, acting wholly under state legislation. Hunter vs. Pittsburgh, 207 U. S. 161; 52 Law Edition 151; Barron vs. Baltimore, 7 Peters (U. S.) 243.

The Act is not, as contended, a denial of due process of law under either the State or Federal Constitution. All process and every remedy which the appellant had at law, he still has. These have been in no way abridged nor taken away from him. All that is required of him is, that before resorting to such process and the use of such remedies, as a condition precedent, he must possess the certificate of a conciliator, showing that the matter was submitted for conciliation, as required by the Act and no conciliation effected; unless the case is one which comes within some of the exceptions specified in the Act and in such event, no certificate is required. Requiring such a condition precedent to be performed before litigation may be initiated is not a denial of due process of law, for after compliance with the terms of the Act, he may resort to process and employ whatever remedies at law he formerly had. Requiring the performance of a condition precedent to litigation, such as contained in the Act, relates to the remedy to enforce the obligation and not the obligation; and where an act such as this in some respects affects the remedy applicable to the enforcement of the obligation at the time of the passage of the act, it is not invalid, if—as this Act does—it provide and permits to remain in force and effect an adequate

remedy for the enforcement of the obligation. Oshkosh Water Co. vs. Oshkosh, 187 U. S. 437; 23 U. S. R. 234; 47 Law Edition 249; Antoni vs. Greenhow 107 U. S. 468; 27 Law Edition 510; Memphis vs. United States 97 U. S. 293, 24 Law Edition 920; National Surety Co. vs. Architectural Decorating Co. 226 U. S. 276; 57 Law Edition 221; 6 R. C. L. Page 359, Section 354.

The plaintiff claims the Act unconstitutional on the ground that the Attorneys of this State have a valid and existing contract with the State to represent litigants in all courts and in all proceedings and that the Act impairs that contract. The law cannot be asserted to be invalid for this reason. The authority granted by the State to persons to practice law, after proof of proper qualifications prescribed by law, and after compliance with any statutory enactments in that respect, is not a contract right, but merely a privilege or license. The record does not show that appellant is an attorney. We assume therefore, that he is not one and hence, is not in a position to question the validity of the statute on the ground that it denies the right and privileges, which it is claimed, are secured to attorneys.

Points five to eight both inclusive may be disposed of together. Appellant contends that the act contravenes Section 20 of the State Constitution which reads: "No special privileges or immunities shall ever be granted which may not be altered, revoked or repealed by the Legislative Assembly; nor shall any citizen or class of citizens be granted privileges or immunities which upon the same terms shall not be granted to all citizens." An examination of the act discloses that no privileges or immunities are granted except such as are applicable to all citizens or any of them under the circumstances and conditions expressed in the Act. All who are in the same situation are similarly affected. These principles, we believe, are fairly supported by the following cases. Vermont Loan & Trust Co. vs. Whithed, 2 N. D. 82; 49 N. W. 318; State vs. Hagen, 44 N. D. 306, 175 N. W. 372.

Point 6 to the effect that the act denies litigants whose claims are within and subject to the provisions of the Act, due process of law, has been above disposed of and needs no further consideration. Point 7 is to the effect that the act is unconstitutional in that the legislature attempted to create a court with powers to hear and determine cases submitted to it, which court was not contemplated in the adoption of the constitution; and on the further ground that the act takes away the supervisory powers of the Supreme Court over all courts of the State. These and objections of a similar nature are easily disposed of by stating in substance what has already been stated, which is that the act does not create a court. It confers upon the conciliation board or the conciliators no judicial power. It simply established a tribunal by providing for the appointment of conciliators whose duties are defined by the act and relate to the settlement and not litigation of claims of the character of those mentioned in the act. The act in no way interferes with the powers of any court. It only requires certain preliminary steps to be taken with reference to the kind of claims mentioned in the act before the powers of the courts are invoked in the enforcement of them.

Point "8"

Under point 8, appellant contends that the conciliation act is not framed in accordance with Section 120 of the Constitution, and further, that the procedure is so defective that a plea of *res judicata* cannot be asserted after the conciliation board has acted. Section 120 provides: "Tribunals of conciliation may be established with such powers and duties as shall be prescribed by law or the powers and duties of such may be conferred upon other courts of justice; but such tribunals or other courts when sitting as such, shall have no power to render judgment to be obligatory on the parties, unless they voluntarily submit their matters of difference and agree to abide the judgment of such tribunals or courts." The legislature, in accordance with this section, did establish a tribunal of conciliation and by law duly prescribed its duties and powers. Under the provisions of the act it cannot render its award binding on the parties unless the parties agree in writing to submit their matters of difference to and agree to abide the judgment by award of such tribunal. The judgment by award when so made may be entered

upon the docket of the District Court as a judgment by award and shall then have full force and effect as a judgment of the court. The provisions of the act in this respect, we think, are within 120 of the constitution. In all of the proceedings which may be or are required to be taken under the Act there is nothing of the nature of litigation in them; nothing has been adjudicated in a judicial sense. The acts of the board and of the conciliators are administrative in character. The act does not confer upon them judicial power, but only power to bring about settlement if the opportunity offers in the manner contemplated by the provisions of the act. If a settlement is effected under Section 14 of the Act, it is authorized to be filed in the District Court and has as a judgment by award, the same force and effect as a judgment of the court. But in doing these acts there is no exercise of judicial power by the board or a conciliator but the award when filed in the district Court is very similar to a confession of judgment in that court by the parties against whom the award is made.

The claim of appellant that it would be impossible for a suitor or litigant in a subsequent action to plead a former adjudication upon a claim determined by the board will not be considered; it is not here involved. Appellant has asserted that conditions might arise, whereby if one is compelled to first submit his claim to the Conciliation Board, that the claim in the meantime might become barred through the expiration of the time within which under existing law he is required to commence his action. The appellant is in no position to raise that question, as it is not involved in this case. Appellant contends that the right of appeal is denied since there is no right of appeal from the conciliation board. This is effectively answered by again stating that a conciliation board is not a court. The act is a valid enactment.

The judgment appealed from is affirmed. Respondent is entitled to his costs and disbursements on appeal.

RICHARD H. GRACE,
J. E. ROBINSON,
A. M. CHRISTIANSON,
H. A. BRONSON,
L. E. BIRDZELL.

Brief Submitted for American Judicature Society

The appeal was from the District Court of Burleigh County, the Hon. W. L. Nuessle, who held the act constitutional.

The brief of Theodore Koffel, counsel for Appellant, raised eight points. Alfred Zuger was counsel for Appellee and the American Judicature Society was permitted to file its brief as *amicus curiae*. Prof. Albert Kocourek, of Northwestern University Law School, was mainly responsible for the Society's brief, Dean John H. Wigmore being of counsel. The last named brief is much too long to reproduce here, but, as it may prove instructive, portions of general interest are quoted. Persons wishing the entire argument may obtain copies of the brief by applying to the secretary of the American Judicature Society.

MAY IT PLEASE THE COURT:

1. As between the immediate parties, the controversy here is of little importance. It concerns an action on a promissory note of sixty dollars. The ultimate issues, however, are of considerable magnitude, involving questions of social welfare not only of the State of North Dakota but of every state in the Union.

North Dakota has the enviable distinction of being the first state in the Union to put into effect a state-wide tribunal of conciliation. The fate of this tribunal of conciliation is at stake in this cause. The action of this court in this cause will become a landmark for the existence of this tribunal.

2. Legislation having for its purpose the regulation or encouragement of voluntary adjustment of legal controversies, when limited to disputes involving not more than two hundred dollars, must be looked upon as directed toward the problem of administering justice efficiently and economically in small causes. There has been a growing conviction that our typical American judicial system has not been efficient in determining such small controversies. In an address on this subject, ex-President (now Chief Justice) William Howard Taft said:

"The greatest question before the American people is the improvement of the administration of justice, civil and criminal, both in the matter of its prompt dispatch and the cheapening of its use."

About one-half of all civil causes involve not more than two hundred dollars, and a great majority of all the people never participate in causes involving a greater amount. The causes in which the really poor are involved are practically all in this class.

The courts are necessarily constituted of such a nature as to enable them to adjudicate the most involved and difficult controversies, and judicial procedure has been evolved with a view necessarily to adapting itself to such causes. The right to trial by jury in all but the smallest causes results very generally in expense out of proportion to the amounts involved. This expense is usually borne by both parties to litigation and by the public as well.

Various efforts have been made to simplify and cheapen judicial procedure in small causes and to this end the Carnegie Foundation for the Advancement of Teaching caused a nation-wide investigation to be made resulting in the "Report on Justice and the Poor," by Reginald Heber Smith (Carnegie Foundation for the Advancement of Teaching, 1920).

In this volume the author reports on various methods of reducing the cost of administering justice in small causes, including conciliation courts and conciliation procedure.

It is commonly understood that the spirit of the law favors voluntary adjustments of legal controversies. The aim of the substantive law is to express rules so clearly that individuals will precisely know their rights and duties, thus obviating controversies. But the law has not attained this desirable end, and tends, in this period of rapid development of commercial, industrial, and social interests, toward growing complexity. Even if the law were ideally clear there would still be a large class of controversies arising from misunderstanding and misinterpretation of facts. It is doubtless true that more controversies are settled without recourse to litigation than ever reach the courts. To that extent, the automatic adjustment of disputes is favored by the courts, providing always that settlements are free from the element of duress. But if the cost of litigation is excessive, in proportion to the amount claimed, duress is present and the wholesome process of voluntary adjustment is more or less vitiated and claimants often remain unsatisfied after "settling" their claims.

The need for reducing the cost to the public is also a subject for legislative consideration.

3. The principle of encouraging private adjustments of legal controversies by law derives in this country from the laws of Norway and Denmark, where a conciliation system has been in vogue since 1797, at which time these countries were under one government. (A very good description of the Conciliation Boards of Norway will be found in the Atlantic Monthly magazine, Volumes 68 and 72, the author being Nicolay Grevstad.)

In Norway, a Conciliation Board consists of two officials, one of whom acts as chairman and the other as clerk. There is a board for every village of twenty or more families, for every parish, and for every city. These officers are chosen to serve for three years at a special election by the voters of the district and are nominated by the city or parish council. They receive no salaries and their fees are limited to twenty-five cents for the summons and fifty cents in case an adjustment is effected. The boards meet every week in the cities and every month in the country districts.

Except in certain classes of cases of an emergency nature, no action can be commenced in a Norwegian court of law unless an attempt has been made to effect conciliation before the appropriate board. To secure the services of the board the claimant writes a letter in which he sets forth his grievance or claim. The person complained of is cited to appear before the board. He is not compelled to attend. If he fails to attend, the board will grant a certificate of failure, which, on presentation to the clerk of court, will permit the claimant to begin an action at law.

Attendance must be in person unless a party is unable to attend, in which case he may be represented by another who is not a lawyer.

All statements made before the board

are privileged and cannot be divulged subsequently in any trial. The board hears the statements of both parties and their witnesses and receives any further relevant evidence and counsels a determination of the controversy agreeable to law and equity. Either party may refuse to agree to any terms which are proposed and in case of failure to agree, a certificate of failure will issue which will permit of formal litigation.

If an agreement is effected the conciliators reduce it to writing, the parties sign it, and it is then recorded and can be enforced the same as a final judgment.

Mr. Grevstad presents figures showing that a very large proportion of all matters presented to conciliators in Norway are adjusted finally to the satisfaction of the parties without reaching the law courts, and that a considerable proportion of the remaining matters are submitted forthwith to the conciliators for them to arbitrate, as provided by the conciliation law.

This practice has remained in the law of both Norway and Denmark for more than a century and was retained in the latter country after the revision of the Danish Code in 1916.

The effect of this practice is not to deny any party of his right to a day in court. It does, however, prevent the moving party from securing process of court and dragging his opponent into court, until he shall have given the opposing party an opportunity to discuss terms of settlement. This is the essence of the law.

It is thus seen to be a measure of protection to individuals against random or spiteful litigation or threats of litigation. Every person is assured by the law that he need not fear actions begun without notice, whether in good faith or not. Notice must be given to any person before he is put to the grievous expense of defending his property and his reputation.

The law obviously aims at creating the best environment for an adjustment founded upon law and deriving from the facts of the case. The parties are required to meet before duly qualified officers who will maintain order and see that each party has full opportunity to state his case. The privilege against using statements then made in a subsequent action enables both parties to disclose frankly all the facts which they know. Finally, the conciliators, having experience in guiding parties to a just settlement, counsel with respect to the terms of agreement. The parties listen to this counsel, knowing that they are entirely free to decline to accept it. Any agreement thus reached is purely voluntary and hence leaves in the minds of both a sense of satisfaction. Whether or not an agreement is effected, very little expense is created to either party, and none whatever to the public. Such is the environment favorable to just settlements under the laws of Norway and Denmark.

The State of North Dakota was settled largely by people of Scandinavian descent, which probably accounts for the provision for conciliation tribunals in the Constitution (Sec. 120).

The experience of many North Dakota people with conciliation in their native countries also explains largely the nature of the statute entitled "An Act to Provide for Conciliation of Controversies," etc., approved March 10, 1921. The procedure laid down in this act follows very closely the procedure provided by the Norwegian and Danish Codes.

It is submitted that the procedure provided by the act for conciliation is not properly and strictly judicial procedure. It looks to operation as a step preliminary to judicial procedure, being in this respect on the same footing as voluntary arbitration. The fact that the legislature provided for the selection of Boards of Conciliation for the several counties of the state by judges of the District Court will not in itself define the procedure thus provided as judicial procedure, because the legislature could just as well have provided for the election of conciliators or their appointment from any other source. It is not until an agreement is effected and is recorded in a court that judicial procedure applies. The fact that the act is limited to controversies involving not more than two hundred dollars indicates that the legislature had in mind the solution of the problem first outlined, that of making adjudication more practical and less expensive, at least in such cases as result in settlements.

4. The act referred to is one adapted to every county and all of the people of the State of North Dakota. It is worthy

of notice, however, that the Norwegian and Danish experience is reflected in a different class of laws intended to accomplish the same result in certain American cities.

In a city having its own local court always open, it is possible to utilize the principle of the Norwegian practice through what has come to be known in this country as the conciliation court. The first such instance occurred in the City of Cleveland, Ohio, where, on March 15, 1913, a branch of the Municipal Court was designated as a Conciliation Court by order of the judges, as provided by law. This order provided that any person presuming to have a claim for thirty-five dollars or less should apply to the clerk of the Conciliation Court and pay a small fee for a summons. The summons is served by mail. When the parties appear, the judge asks if a settlement has been effected. If so, it is recorded as a judgment. If not, the parties are asked to retire and negotiate. Upon returning to the bar they are again asked if they have arrived at an understanding. If not, the judge hears their testimony and finds a judgment. If either party is dissatisfied, he may have the case transferred to another branch of the Municipal Court, there to be tried formally with a jury.

At the end of seven years' experience the clerk of the Municipal Court of Cleveland reported that over 36,000 judgments had been rendered in the conciliation branch and in only three cases had either litigant sought further litigation. (Bul. XV Am. Jud. Soc. p. 2.)

The success of the Cleveland Conciliation Court is attributed to the fact that the parties have confidence in the judgment and disinterestedness of the judge, and to the further fact that the Cleveland Bar Association lent its aid to make the procedure successful, advising lawyers not to go to the Conciliation Court, which advice is observed by the bar of that city.

The City of Minneapolis was provided with an additional branch known as the Conciliation Court by an act of the Minnesota Legislature. (Laws of Minnesota, 1917, c. 263.)

In cases involving less than fifty dollars, the judge of the Conciliation Court is empowered to render judgment if the parties do not reach an agreement. But a dissatisfied party may still have the action removed to another branch of the Municipal Court for formal trial by jury. In cases involving fifty dollars, and not more than one thousand dollars, the power of the conciliation judge is purely advisory. (An explanation of the Minnesota court appears in *Minn. Law Review*, Vol. 1, p. 107. An account of its operation in the first eight months is found in Journal of the American Judicature Sosiety, Vol. II, No. 1, p. 16. See, also, Bul. XV Am. Jud. Soc. pp. 4-18.)

The Minnesota State Bar Association, which had been active in promoting passage of the Act of 1917 voted in favor of providing conciliation courts for all the people of the state with jurisdiction up to one hundred dollars. In 1919, an act was passed by the Minnesota Legislature providing for a conciliation branch of the Stillwater Municipal Court. (Laws of Minnesota, 1919.)

The Minnesota Legislature in 1921 provided a branch Concilation Court for the Municipal Court of St. Paul. (Laws of Minnesota, 1921.)

The same legislature passed an act which permits city councils in all cities which have municipal courts to institute conciliation branch courts. This brings the conciliation court within the reach of litigants in all of the larger cities of the state. (Laws of Minnesota, 1921.)

It appears from the foregoing experience that within cities which have suitable judicial machinery it is possible to provide for conciliation through special procedure administered by a judge. The people of such a city have easy access to such a branch court. But for people living under rural conditions this type of conciliation is not adapted. Having these facts in mind, the North Dakota Legislature shaped a system looking to the conciliation of disputes through administrative agents, rather than judges, following the Norwegian system.

5. It is not too much to say that today one of the chief interests of the leaders of the American bar is improvement in the procedure of justice. There has been and still is widespread dissatisfaction among the people with the delay, expense, and uncertainty of litigation. The layman has been inclined to attribute all the evils of the administration of justice to the

self-interest of the lawyer class. In manifold verbal forms, Luther's characterization of lawyers as bad Christians ("Juristen böse Kristen") has become an accepted commonplace of popular belief. Within the law profession itself, another explanation is accepted. It is not the moral obliquity of men seeking to further their own selfish ends by making justice tortuous, difficult, and mysterious at the expense of the public, but the explanation is that the very nature of law develops an ingrained conservatism which overtakes those who deal expertly with its manifestation.

A foreign observer, a Frenchman, has recently emphasized this point of view in a valuable book reviewing the backwardness of American practice in dealing with progressive measures. (Professor Edouard Lambert of the University of Lyon in "The Government by Judges and the Opposition Against Social Legislation in the United tSates": "Le Gouvernement des Juges et la Lutte contre la Législation Sociale aux États-Unis.")

Whatever may have been the just cause of complaint and criticism in the past, there is no mistaking the fact that in recent years the better part of the bench and bar has been thoroughly aroused to the needs of a situation involving remarkable changes in social life brought by the new economic regime of the last generation. It is now pretty well recognized, as was said by Mr. Justice Holmes in a dissenting opinion (*Lochner* v. *New York,* 198 U. S. 45, 74) that "the Fourteenth Amendment does not enact Mr. Herbert Spencer's 'Social Statics.'" The view is no longer exclusively held that legislatures cannot be trusted to make innovations unknown to the period of William and Mary. As was remarked by the same great judge (in *M. K. & T. R. Co.* v. *May,* 194 U. S. 267) "it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts." The time has clearly passed when the courts will find constitutional objections under the due process clause to ideas simply because of novelty or because of conjectural evil. The older view expressed by Mr. Justice Story ("Commentaries," ii 653) that constitutions "are to speak the same voice now and forever" has in the process of time been modified so that it is no longer deemed either a duty of piety or a postulate of political wisdom to permit the dead hand of the past to obstruct necessary movements of progress. "A constitution states, or ought to state, not rules for the passing hour but principles for an expanding future," says Mr. Justice Cardozo of the New York Court of Appeals ("The Nature of the Judicial Process," New Haven, 1921). The latest expression of judicial views which summarize the need for permitting the states to meet their problems in their own way is that of Mr. Justice Holmes in his dissent in *Truax* v. *Corrigan,* 1921, 42 Sup. Ct. 124, where he says:

"There is nothing I more deprecate than use of the Fourteenth Amendment beyond the absolute compulsion of its words to prevent the making of social experiments that an important part of the community desires * * * even though the experiments may seem futile or even noxious to me and to those whose judgment I most respect."

As may be seen in the notable and important cases which reach the Supreme Court of the United States and which are very commonly decided by a divided court, there is reluctance to permit to the states unlimited latitude in economic questions, but since the *Lochner* case was decided in 1904—now nearly twenty years ago—it is apparent that even in this field there has been a notable liberalization of judicial attitude toward state legislation. But we are not concerned with that here. The question at this bar does not touch any of the mooted problems of economic freedom or privilege. The question here is one of procedural reform. The attitude of the courts toward these matters is today with rare exceptions one of tolerance and friendly interest. The existence of the various kinds of boards and commissions which exercise judicial or quasi-judicial powers, executive powers, and legislative powers, demonstrates two things: (1) the consciousness of the law profession that some method of relief is absolutely necessary today in dealing with the increasing bulk of justiciable controversies; and (2) that the courts must be relieved by new methods of organization and of procedure to be able to continue to do effective technical work. The old jeal-

ousy of jurisdiction is gone. The problem which confronts the nation is not one of verbal calisthenics. It is a realistic problem—we must find better ways and methods to do justice between litigants. It has been said by an eminent educator that "the world has been remade in the last half century." If this statement is only measurably accurate, the legal establishment cannot stand by with indifference wrapt in the haughty contempt of the barons of another age, and say *"Nolumus mutare leges Angliae."*

6. Indifference is no longer the part of the legal profession. There is ample proof. Some evidences may be permitted.

That ancient barnacle, the common law distinction between local and transitory actions, has been abolished in many jurisdictions either by judicial practice or by legislation. (Cf. *Little* v. *Chicago R. Co.* (1896), 65 Minn. 48; 67 N. W. 846.)

Notice pleading has been adopted in England, Michigan, the Municipal Court of Chicago and elsewhere (Cf. Sunderland, "The Michigan Judicature Act of 1915," in *Mich. L. Rev.* XIV, 551).

Workmen's compensation acts have been adopted in most of the states.

The Torrens system of land registration, involving many judicial or quasi-judical powers, has been widely adopted in recent years.

The declaratory judgment procedure has been adopted in several states. Such an act was declared unconstitutional by the Michigan Supreme Court (in *Anway* v. *Grand Rapids R. Co.* (Mich. 1920), 179 N. W. 350), but the decision has been universally disapproved by experts on procedure (Cf. Rice, "The Constitutionality of the Declaratory Judgment," in *W. Va. L. Quar.* XXVIII 2). A similar act has since been upheld by the Supreme Court of Kansas (in *State* v. *Grove* (Kans. 1921), 201 Pac. 82). The existing constitutional convention of Illinois has reported a provision for the declaratory judgment, and for a consolidation of courts in Cook County. Several of the metropolitan centers have municipal courts with divisions into branches for differing kinds of cases with simplified procedure.

Contractual arbitration acts have been adopted in practically all of the states and the irrevocability of submissions to arbitration has been held constitutional in *Berkowitz* v. Arib (1921), 230 N. Y. 261, 130 N. E. 288, and in *White Eagle Laundry Co.* v. *Slawek* (1921), 296 Ill. 240, 129 N. E. 753. Objections were made to these acts similar to those urged here by appellant. It was argued that trial by jury was denied, that the courts were ousted of jurisdiction, and that the act deprived the parties of property without due process of law. These points of objection were overruled. These cases, we submit, are practically conclusive of the questions at bar.

Small claims courts have been instituted in the Municipal Courts of Chicago, Cleveland, Fort Leavenworth, Kansas City, Philadelphia, Portland, Topeka, and recently also in Massachusetts, California, and South Dakota by acts which provide for state-wide operation.

In various states by changes of a constitutional and statutory nature, the courts have legislated procedural rules. Among these states are Michigan, Colorado, New Jersey, New York, Pennsylvania, and South Dakota.

Many other evidences might be cited to support our point that the law profession is thoroughly aroused to the need of changes in the method of administering justice. This further evidence may be found in the reports of the various bar associations in recent years. Any attempt at enumeration would merely encumber this brief. For the details of the movements above briefly sketched see the *Journal of the American Judicature Society* (now in the sixth volume), and, for an admirable summary, the article of Dean E. F. Albertsworth. "Leading Developments in Procedural Reform" (*Cornell L. Quar.* (June, 1922), Vol. VII, 310). The extent of the interest in the subject is well reflected by Dean Pound's "Bibliography of Procedural Reform" (in *Ill. L. Rev.* (Feb. 1917), Vol. XI, 451).

The case at bar is simplified in two respects: (1) it touches only a question of law,—Is the Conciliation Act (Session Laws, 1921) constitutional?—; and (2) the Act in question is authorized by the constitution of North Dakota (Sec. 120). The questions involved therefore reduce to these points:

A. Did the legislature act in accord-

ance with the constitutional power? In other words, did the legislature establish a tribunal of conciliation?

B. Did the legislature in establishing a tribunal of conciliation contravene any other provision of the state constitution?

C. Does the Act violate the federal constitution?

Point One

The first point was that the title of the act was defective in that the act contained matter not germane to the subject expressed in the title. North Dakota decisions are liberal in respect to limitations upon the form of statutes, and since the question is practically a local one, there is no need for quoting on this point.

Point Two

That a defendant is deprived of the right of trial by jury is the second point urged. As to this; the brief says:

1. The appellant (plaintiff below) could have had a jury trial in the District Court had he desired it. The record here shows that a jury was waived in the District Court.

The Conciliation Act does not provide for a trial by jury. The act provides (Sec. 12) that—

"In case the party complained of shall fail to appear at the Conciliation hearing or for any other reason there shall be no settlement of the controversy *by agreement of the parties* [our italics], then the conciliator shall give to either or both of the parties, upon request, his certificate to the effect that an attempt has been made in good faith by the moving party to effect a settlement.* * *"

If an agreement is not effected, the plaintiff, upon obtaining his certificate, may proceed to sue in a court of competent jurisdiction where he may have a trial by jury if the law allows one in the case.

It has been held that the constitutional guaranty of trial by jury is satisfied if a jury trial is afforded on appeal though such jury trial is not given in a court or tribunal of primary jurisdiction. *Flour City Fuel & Transfer Co.* v. *Young* (1921, Minn.), 185 N. W. 934.

The above case is the leading one relied on by the appellant for his contention. Unless we misapprehend it, it is conclusive against the appellant's contention and is practically decisive for this case. The case arose on the Minnesota Act (Laws 1917, c. 263) providing for the Conciliation Court of Minneapolis. The act did not provide for jury trial in the Conciliation Court. The defendant demanded a jury trial which was refused to him. The defendant brought certiorari to review a judgment for the plaintiff in the Conciliation Court. The Supreme Court of Minnesota held that since the defendant had a power to remove the case to the Municipal Court of Minneapolis, where a jury trial is given on payment of a trial fee, the constitutional guaranty of trial by jury was not violated.

In the *Young* case, *supra,* the Supreme Court of Minnesota also held that the requirement of a $5 trial fee where the case was removed from the Conciliation Court to the Municipal Court, whereas the usual trial fee in the Municipal Court was $3, was not an unreasonable burden on the right to have a trial by jury and that the fee provision was constitutional. The Minnesota court did, however, rule that the provision of the Conciliation Court Act which required the party removing his case from the Conciliation Court to the Municipal Court, to give a bond undertaking to pay the judgment of the Conciliation Court and *also* the judgment of the Municipal Court is an unreasonable burden on jury trial and is invalid. The bond provision was ruled to be separable and it did not invalidate the remainder of the act. The bond feature in the Minnesota act is not found in the North Dakota Conciliation Act and that element of the *Young* case does not require discussion here, although it may be remarked that a provision requiring the payment of two judgments based on the same claim—if that is the meaning of the bond provision—could hardly be sustained, whatever the rule might be if an act required a bond in the usual form. (Cf. *Capital Traction*

Co. v. *Hof,* 174 U. S. 1: 19 Sup. Ct. Rep. 580: 43 L. ed. 873.)

It may also be noticed that the Minnesota Conciliation Court was not authorized in terms or created by the Minnesota Constitution. It was the creation of the state legislature. The North Dakota Conciliation Tribunal is expressly authorized by the constitution.

2. The constitutional guaranty of trial by jury has no meaning if there is no trial. The proceedings before the Conciliation Board are not even in the nature of a trial. * * * *

If the contending parties come to an agreement before the conciliator, the conciliator "shall forthwith certify to the District Court * * * the terms of the agreement. * * *" If they do not agree he issues a certificate of attempt to conciliate. The conciliator can make no finding on the merits of the controversy. He cannot enter a judgment. He has a purely ministerial function of transmitting the terms of agreement to a court, if an agreement is reached. Greater powers than these are commonly exercised by persons whom no one has thought of denominating as judges or courts. Thus, clerks of courts may enter judgments by default or upon confession of judgment. The conciliator cannot effectually summon a party to the controversy. The party "summoned" to appear need not appear unless he wills. The conciliator cannot act against him if he fails to appear. Since he cannot enter a finding or a judgment, he cannot enforce one. There is wanting every attribute which distinguishes a court from what is not a court.

In a case relied on by appellant (Appellant's Brief, p. 19)—*State* v. *Nast* (209 Mo. 708; 108 S. W. 563)—where it is held that a committing magistrate is not a court, and where, also, by the way, it is said that calling an officer or agency of the state a "court" does not make it a court, a court is defined as "a body having the power to hear, determine, and decide" (pp. 566, 567). The conciliator has none of these powers — he does not hear, he does not determine, and he does not decide. He does not "hear" in a technical sense because his function is to conciliate. It is true that the conciliator is empowered to receive the stories of the witnesses and the parties, but this is "to endeavor to effect an amicable settlement." This is not a trial. It is the function of "good offices." It is perfectly clear that the conciliator has no power to determine or decide. Since an organ or agency of the state which has no power to make a finding or enter a judgment is not and cannot be a court, it follows that a trial cannot be demanded or given in what is plainly not a court, and it likewise follows that the constitutional guaranty of trial by jury finds no place where there is no trial. (The leading case for the definition of judicial power is *Prentis* v. *Atlantic Coast Line* (1908), 211 U. S. 210 (226); see, also, *Lemke* v. *Horner* (1922), 42 Sup. Ct. Rep. 250.)

3. The Constitution of North Dakota (Sec. 120) in making provision for "Tribunals of Conciliation" expressly negatived the idea of trial by jury in matters of conciliation. The very idea of a tribunal of conciliation excludes the idea of a trial of any sort. If there can be no trial, there cannot be trial by jury. The constitution provides (Sec. 7) for trials by jury and in the later provision (Sec. 120) it provides for tribunals of conciliation. These are not conflicting provisions. Nor is Sec. 120 an amendment of Sec. 7. In other words, Sec. 120 does not provide that in certain cases trials are to be held without a jury. It does provide that in certain matters there may be a procedure unlike the common law procedure in that there is no trial, no jury, no judgment, no execution, but where the parties amicably meet and discuss their legal differences before an officer of the state in whom the contending parties may repose confidence, with a view to reaching an agreement which is to be certified to a court. In a word, the two sections deal with entirely different subject matters of procedure. A conciliation hearing is not a trial. The conciliation procedure also necessarily

must precede common law trial procedure because a common law trial leads to a finding or verdict and a judgment. After these steps, there is nothing to conciliate. The North Dakota Conciliation Act logically provides that the conciliation procedure shall be a condition precedent to a trial. It could not logically be otherwise, since conciliation procedure and contentious procedure cannot coexist. The two things are as unlike as war and peace.

The North Dakota Constitution does not give a definition of what is meant by a Tribunal of Conciliation (Sec. 120), but it is a familiar rule of constitutional construction that when provisions have been adopted in a constitution which are derived from another jurisdiction, it will be presumed that the framers adopted the construction already made. (*Brown* v. *Walker*, 161 U. S. 591: 16 Sup. Ct. Rep. 644: 42 L. ed. 819.)

A. The history of the Conciliation Act can easily be traced. An account of the introduction of the North Dakota Senate bill is given in the *Journal of the American Judicature Society* (April, 1921), Vol. IV, No. 6, p. 165. A draft of "An Act to Provide for Conciliation" is published in Bulletin XV of the American Judicature Society entitled "Conciliation and Informal Procedure" (Dec., 1920). The Minnesota Conciliation Court was created in 1917 (Laws 1917, c. 263). The history and antecedents of the Minnesota act are stated in an article by Professor Vance in *Minnesota Law Review* (Feb., 1917), Vol. I, p. 107. Other discussions of conciliation procedure by Nicolay Grevstad, by Judge Manuel Levine, and by Dean W. R. Vance are published in the *Journal of the American Judicature Society* (June, 1918), Vol. II, No. 1, pp. 5, 10, 16 sqq.

There can be no shadow of doubt that the Minnesota act was derived from the conciliation procedure of Norway and Denmark. That procedure negatives the idea of a trial by jury, or, indeed, any trial at all. In construing a constitutional provision this court said in *State* v. *Taylor* (22 N. D. 362; 133 N. W. 1046), that the presumption is in favor of the natural and popular meaning understood by the people at the time of adoption.

B. The Legislature of North Dakota (Laws 1893, c. 45; Laws 1895, c. 8) has repeatedly given a construction to Sec. 120 of the North Dakota act which negatives the thought of a jury trial in conciliation cases. In *State* v. *Taylor, supra* (at p. 374), this court said:

"When the legislative assembly repeatedly construes or interprets a constitutional provision, such construction or interpretation should be followed by the courts when it can be followed without doing violence to the fair meaning of the words used, in order to support the legislative action and give effect thereto, if the language construed admits of such construction."

C. Not only is it clearly demonstrable that the meaning of the words "Tribunals of Conciliation" have a well defined and widely understood popular and technical meaning, especially in the states of the northwest, which are largely populated by Scandinavian inhabitants, but it is universally conceded that such tribunals have a history which goes back to the roots of our common law. A conciliation tribunal is not a mere novelty. It is older than the courts. It is the germ from which all courts in all civilized countries grew up. Three diverse illustrations from ancient law may be tendered. (1) The Shield Scene in Homer's Iliad (Bk. xviii) is a striking picture of a centuries-remote conciliation court of the arbitration type. ("Sources of Ancient and Primitive Law": Evolution of Law Series: Little, Brown & Co., Boston (1915), Vol. I, p. 23.) (2) The description by the great Antonine jurist, Gaius, of the sacramental action which antedated the Christian era, clearly shows are arbitral and voluntary elements in the administration of justice, — elements which persisted long after the rise of the political state (op. cit. p. 620). (3) The Nyals Saga, the great Icelandic epic, describes the conciliation procedure of the

1100s (op. cit. p. 122). The robust characters dramatically pictured in the Nyala are the forebears of many of the inhabitants of the northwest. Their vigorous and yet peace-loving racial history is represented in the North Dakota Conciliation Act of 1921. Its history traces back to the infancy of our law. It was the sole resort of men with unadjusted disputes, centuries before the courts of modern times were conceived.

4. If it might be supposed that Sections 7 and 120 are in conflict, the later provision would control because of its position in the constitution. If two provisions are in conflict the last in order of time or of position will prevail.

A. The people of North Dakota intended to have a Tribunal of Conciliation of the legislature saw fit to establish it. As this court has said, the object sought by the constitution to be accomplished must be kept in mind.

Trial by jury would destroy the procedure of conciliation. Conciliation and contention are fatally incongruous.

B. The legislature is the exclusive judge of the means to be provided for the promotion of a constitutional object.

C. There is even a presumption in favor of constitutionality by the mere fact of enactment of a statute.

5. It being apparent that Sections 7 and 120 are not in any way in conflict, and it being equally clear that a Tribunal of Conciliation does not import the idea of a jury trial or any trial whatsoever, the question remains whether a state has power to deny a jury trial where the state constitution is not violated.

A. In the first place, even where a jury trial is required, the constitutional provision means that it is required only in cases where it was allowed prior to the adoption of the constitution. It does not include cases where jury trials did not obtain at common law.

For example, a jury did not obtain at common law and cannot now be demanded in equitable actions, in summary jurisdiction as in contempt of court, in actions created by statute, in default cases, in proceedings to bind over to a grand jury.

It would seem to be clear that even if a conciliation proceeding could be considered a "judicial" hearing in the strict sense, that a jury trial could not be demanded for the reason that such a proceeding was unknown to the common law at the time of the adoption of the constitution.

B. It is well settled that in judical proceedings, whether civil or criminal, a state may, if it chooses, dispense with trial by jury. Even in criminal cases, it may dispense with indictments, and may permit a conviction in felony cases by a jury of less than twelve.

Maxwell v. *Dow,* 176 U. S. 581.
Walker v. *Sauvinet,* 92 U. S. 90.

C. Summarizing the argument up to this point, we contend (a) that the Conciliation Board is not a "court," that its procedure is not technically a "trial" procedure, and that, accordingly, the constitutional guaranty of trial by jury is irrelevant; and (b) even if the Conciliation Board can in any sense be regarded as a court, the North Dakota Constitution has contemplated a procedure without jury trial (since a jury has no place in a conciliation proceeding) and that such procedure not being inconsistent with any provision of the state constitution is likewise not repugnant to any provision of the Federal Constitution.

6. We have already discussed the decision of the Minnesota Supreme Court holding the Minneapolis Conciliation Court Act valid. The decision in that case was a stronger decision than is required here, inasmuch as the Minneapolis Conciliation Court was the creature of statute without the direct support of a constitutional provision. We believe that case is decisive of the point now under discussion and is also practically conclusive of all the other constitutional objections raised by the appellant. It may be of some value to call attention to two other statutes of recent years which involve the question of jury trial and other constitutional questions brought in issue here. It seems to us that the constitutional questions in those cases are directly analogous to the questions involved in this case.

A. The first of these statutes is the Workmen's Compensation Act. (See N. D. Laws 1919, c. 162.) This statute in varying form has been enacted in nearly all the states of the Union. It was the most revolutionary legislation that has ever been seen in our system of law in modern times. It abolished rights of action and defenses recognized by the common law and cast liability on an employer when he was in no way at fault in the management of his business. In the beginning, as is well known, this radical legislation met with the most energetic resistance wherever it appeared. In the beginning, also, a few states found it necessary to modify their constitutions in order to run the gauntlet of the courts. Five states have such constitutional provisions authorizing a workmen's compensation act. In the remainder of the states these acts have been initiated and sustained without direct constitutional authorization. The long and bitter legal struggle to fit the law to the needs of the new industrial age has ended all along the line in surrender to this beneficent legislation. Every conceivable objection was raised. Every constitutional guaranty and inhibition, state and federal, was invoked. It was urged that it was class legislation, that the classifications were unreasonable, that there was denial of equal protection of the laws, that there was denial of due process, that the obligation of contracts was impaired, that there was interference with liberty of contract, that the right of trial by jury was abolished, that the privileges and immunities of citizens were abridged, that there was a delegation of legislative and judicial power, that the title of these acts was defective, and, not to enumerate further, it was ever asserted that this legislation violated the guaranty of a republican form of government. This is now an old story and it is embalmed in a mountain of cases. The Union has not been wrecked as many predicted, the industries of the country still function, and the legal profession grows and prospers. No state, so far as we are aware, has been willing to go back to the era of the ambulance chaser and the clogged personal injury calendar, with the incidents of large numbers of disabled workmen ending their days in poorhouses while their starving families were scattered to the four winds of misfortune.

It is not our purpose to urge a commission form of government, but it may be pointed out that the courts must be relieved of some of their burdens if justice is to be properly administered. The legislature easily finds relief by the creation of boards and commissions, but the judicial function cannot be delegated in the same way. The state must either create more courts or find a more efficient mode of administering justice or must attempt to turn at various points the prodigious flood of litigation into channels where it will not inundate the whole judicial establishment. The act under consideration is of the last type. It seeks to spare the state, the courts, the taxpayer and the citizen by diverting some part of the flood of litigation into a new channel. There can be no two ways of thinking about this effort. It is beneficent. It has worked well where it is now in practice in Norway and in Denmark, in Minneapolis, and elsewhere, and there is no reason to believe that it will work harm to the state or to society, or to any private person. There is no reason to suppose that it will even work evil to lawyers. Conciliation procedure we believe will put the legal profession on a higher plane. The work of the bar as a whole, so far as petty disputes are eliminated, will be of more dignified character. Trial work should under those conditions be better compensated and an improvement eventually may be expected in the preparatory work of presenting such cases as need judicial arbitrament. The net result will be an advantage to the bar and to society.

B. The second of these recent statutes is the Arbitration Act. Many of the constitutional objections raised on this record were advanced against that act. In the same year (1921) that act was held constitutional in Illinois and in New York.

White Eagle Laundry Co. v. *Slawek* (1921), 296 Ill. 240: 129 N. E. 753.

Berkovitz v. *Arib & Houlberg* (1921), 230 N. Y. 261:130 N. E. 288.

In substance these acts hold that an agreement to submit a controversy to arbitration is irrevocable. At common law such an agreement was revocable before an award was made.

C. In a wide sense, arbitration is a variant of conciliation. The reasoning in the above cases, we submit, controls the case at bar. The situation is even stronger where the parties are compelled to a procedure, judicial in nature, ending in an award outside of the courts, than where the parties are not compelled to submit to an award. Under the Conciliation Act, the parties do not submit to an award; indeed, the conciliator cannot make an award even if the parties come to an agreement. If, therefore, an arbitrator under the Arbitration Act does not exercise judicial power, as was held by the court in the *Slawek* case, then clearly a conciliator who cannot make an award does not exercise judicial power, and, accordingly, there is no trial in a technical sense and the constitutional guaranty of trial by jury can have no application.

D. It may be doubted whether the appellant can raise the question of trial by jury on this record. It is an elementary rule fortified by hundreds of cases that no person can raise a constitutional objection to a statute unless he has shown that it actually and certainly has deprived him of a constitutional right. The plaintiff did not ask for a jury trial, and since he did not ask for it, he can hardly be said to have been deprived of a jury trial. That question is not properly raised on this record.

Point Three

Appellant asserts that the act violates Sec. 13 of the North Dakota Constitution and Articles 5 and 14 of the Constitution of the United States. It is claimed that the act could not abridge procedural rights in a claim existing prior to its passage. Also that the state cannot forbid attorneys from practicing before conciliators. The record did not show that appellant was an attorney or that his rights were in any way abridged, but, the brief continues:

Even if the appellant were in a position to raise the constitutional question, we are not ready to subscribe to the view of the appellant, if we understand his position, that the legislature may not require a litigant to appear in a matter preliminary to litigation either in person or by an agent.

It is settled that there is no right to be admitted to practice law.

Bradwell v. *Illinois,* 16 Wall. (U. S.) 130.

Danforth v. *Egan,* 22 S. D. 43: 119 N. W. 1021.

Cohen v. *Wright,* 22 Cal. 293.

Ex Parte Hunter, 2 W. Va. 122.

The language of the courts in these and in other cases is: "The right to practice law is a privilege or license"; "It is not a contract"; "It cannot be holden to confer any vested privileges, but is liable to be modified in any manner which the public welfare may demand"; "It is not a constitutional right but merely a privilege"; "It does not rise even to the dignity of an office"; "It is a mere statutory privilege"; "It is subject to the control of the legislature."

It has also been ruled that a tax on attorneys is not unconstitutional.

Ohio v. *Gazlay,* 5 O. St. 14.

St. Louis v. *Sternberg,* 69 Mo. 289.

Baker v. *Lexington,* 21 Ky. 809: 53 S. W. 16.

Since the point is not involved on this record, further discussion is unnecessary, but in leaving it we may be permitted to recall that in the ancient beginnings of our system of law, parties never appeared by attorney. (See "Primitive and Ancient Legal Institutions": Evolution of Law Series (Vol. II) p. 643 (Heusler); cf. also "Sources of Ancient and Primitive Law" (op. cit. Vol. I) p. 122. (Icelandic Procedure)). It may also be recalled that in the later development of law, attorneys were often excluded from particular kinds of cases. Thus Blackstone (Comm. iv, 355) tells us "it is a settled rule at common law that no counsel shall be allowed a prisoner upon his trial upon the general issue in any capital crime.

* * *" See also Comm. iii 25). In various American colonies, in Virginia and elsewhere, attorneys were entirely excluded from the courts. Thus in Massachusetts Colony attorneys were excluded for a period of about fifty years.

Just one word more may be indulged. If the Conciliation Board is not a court, as is clear that it is not, an attorney cannot complain that he is not permitted *to practice law* before it.

Point Four

Under the fourth point, in which Appellant avers that the act impairs the obligation of contracts, it is urged that:

"The members of the Bar of this State had a valid and existing contract with the state to represent litigants in all courts and in all proceedings. See 'Certificate of Admission.'"

This claim was deemed to have been met in the decisions and argument quoted under point three.

Point Five

Among other points Appellant claims that the classification which makes controversies involving less than $200 subject to conciliation procedure is unjust. As to this the Society points out that the classification is identical with that which separates causes between justices of the peace and District Courts.

Point Six

Here Appellant invokes Sec. 22, Constitution of North Dakota, which prohibits the impairment of the obligation of contracts. In the Society's brief the point is discussed under points three and four.

Point Seven

Assuming that a Conciliation Board is a court, Appellant points out a number of discrepancies with the judiciary article of the constitution. In opposition it is argued that no new court is created by the act.

Point Eight

Here it is claimed that a plea of *res judicata* cannot be pleaded after the Conciliation Board has acted, because of defective procedure. As to this it is answered that the report of the Conciliator, required by Sec. 11 of the Act, and entered of record by the District Court is sufficient.

Conclusion

The Society's brief concludes with the following:

The Conciliation Act is an experiment on American soil. It may work well or it may work badly. With that the court is not concerned. It is not a condition precedent of valid legislation that it must be of such character as to convince the court of its wisdom or desirability. Instances are plentiful where legislation misses fire, where it fails to achieve an intended object, where it proves unsatisfactory to the community, but it has never been supposed in constitutional theory that such considerations were to be entertained by the courts in their very limited sphere of supervision over the activities of the legislature. If such considerations were legitimate in a judicial inquiry, the available evidence touching conciliation procedure is favorable from the standpoint of legislative policy. Ten years' experience will silence all preconceived notions. The transition period must be bridged and the novelty must wear off before even the legislature would be justified in taking a backward step.

It is fortunate that the first state-wide Conciliation Act in the United States is being put to test under the most favorable conditions—in a state without great metropolitan centers and among inhabitants many of whom are familiar with the advantages of conciliation procedure in the country whence the North Dakota Act was derived. The success or failure of the Act will perhaps depend in large measure upon the personnel of the Conciliation Boards. If it succeeds, the North Dakota example will rapidly be imitated in other states. If it fails, the legislature of North Dakota may be depended upon to take action accordingly. In purpose, it is a beneficent piece of legislation. It is intended to serve the public welfare. It is a measure of public justice. It violates no vested right. It impairs no obligation. It takes away no remedy. It deprives no man of his property. It is, we respectfully submit, a valid enactment in all respects upon the record.

The Lawyer as a Privileged Servant of Democracy

Letter on Legal Education by Mr. Alfred Z. Reed, Author of Carnegie Bulletin, "Training for the Public Profession of the Law"

Dear Sir:

Your December number contains a paper read last year before the Arizona Bar Association which places the following interpretation upon views expressed by me in my recent volume, *Training for the Public Profession of the Law*:

"Mr. Reed seems to feel that by requiring high standards of education, our lawmakers, executives and judiciary will become an aristocratic class, and will not be close to the people."

It would be somewhat surprising that a volume published under the auspices of the Carnegie Foundation for the Advancement of Teaching should repudiate high educational standards on the grounds alleged, or for that matter on any grounds. Certainly nothing was farther from the mind of its author. If the volume has produced this impression upon any reader, there must be something wrong either in its manner of presentation, or in the care with which it has been read. I should be the first to acknowledge that in a piece of work that was primarily intended to be an accurate and authoritative statement of facts I regarded the conclusions to which these facts led me as of subordinate importance. Intentionally I did not organize the volume for the purpose of proving any particular thesis of my own. If for this reason the conclusions have not been always clearly understood, I must accept my full share of responsibility for this outcome. Yet I cannot think that responsibility for misunderstanding is mine alone. A hasty jumping at my assumed conclusions, fortified by quotation of words wrenched from their context, tends to produce the same result. The paper of the gentleman from Arizona contains an illustration in point. He quotes the words that I do not now italicize, and only these words, out of the following passage in my volume:

"The scholarly law school dean properly seeks to build up a 'nursery for judges' that will make American law what American law ought to be. The practitioner bar examiner, with his satellite schools, properly seeks to prepare students for the immediate practice of the law as it is. The night school authorities, finally, see most clearly that the interests not only of the individual but of the community demand that participation in the making and administration of the law shall be kept accessible to Lincoln's plain people. *All these are worthy ideals. Taken together, they roughly embrace the service that the public expects from its law schools as a whole. But no single institution, pursuing its special aim, can attain both the others as well."* (Page 418.)

This passage may not be regarded by all as stating sound doctrine. Taken by itself, it may not even be an adequate formulation of doctrine that I believe to be sound. But if read in its entirety it can hardly be held to substantiate the impression which the gentleman has formed as to what this doctrine is. I do not for a moment charge him with deliberate misrepresentation. He does not profess clearly to understand my meaning. He does not explicitly put forward the quotation as evidence that his impression as to what my meaning may be is correct. But to quote me at all in this imperfect way, in a paper that purports even tentatively to express my views, has the unintended effect of misleading his readers.

Since my most important conclusion, although recently accepted by the Washington Conference on Legal Education, was somewhat of a novelty at the time the volume appeared, it may help to clarify the situation if I now briefly restate it.

It is a truism among those interested in promoting a sound system of legal education and admission to the bar that competency and character can best be developed by raising the existing standards of legal education; and furthermore, that among the many ways in which these standards might be raised, an increased attention to the general educational qualifications of our prospective lawyers is perhaps the most fruitful and important. No one subscribes to this view more strongly than does the present writer.

Saturated as he has been, however, with the reading of old Bar Association proceedings, he has discovered that this doctrine has been preached for many years, with scant effect. Asking himself the reason why, he persuaded himself, if not others, that it was because most of those who have preached it have grasped only half the truth. It is true that competency and character among lawyers can best be developed by the means described. If this were the only desideratum, it would naturally follow that a restriction of the legal profession to college graduates should be immediately sought, and indeed would probably already have been attained. But—shocking as this statement may sound to some who hear it enunciated for the first time—the pursuit of competency and character does not constitute the sole fundamental principle on which we may proceed. There is that in the nature of the legal profession in a self-governing community which requires that access to its ranks should be kept open, on as nearly as possible equal terms, to all elements in the community. Or if the phrasing of the Washington Conference be preferred:

"Since the legal profession has to do with the administration of the law, and since public officials are chosen from its ranks more frequently than from the ranks of any other profession or business, it is essential that the legal profession should not become the monopoly of any economic class."

(*Fifth Resolution.*)

This principle is neither more important nor less important than the principle that the privileged servants of democracy should be competent and of high character. Both principles together must always be kept in mind. It is this unfortunate complexity of its ultimate aim —a complexity forced upon us by our fundamental political ideals—that distinguishes, in this country, preparation for the law from preparation for other learned professions. The coexistence of two quite different considerations, to each of which equal respect must be paid, has retarded the development of a proper system of legal education and admission to the bar in the past, and makes it vastly difficult to agree upon a constructive programme for the future.

In the past these two principles have tended to be upheld by separate elements in the community, each to the exclusion of the other. On the one side have been those who have preached the raising of standards, irrespective of any consideration other than the value to the community of the thoroughly expert. On the other side have stood those who have fought to make it possible for young men of modest means to enter the privileged class of lawyers. On both sides there has been much sincerity, but on both sides institutional interests have also been to some extent involved. This has sometimes injected a note of asperity into the discussion. The actual arguments have become somewhat staled by repetition. On the whole, those who have pleaded for higher standards have had the best of the argument, but the upholders of the claims of future Abraham Lincolns have had the best of the fight. In no state are bar admission requirements today so high as to make it impossible for all social elements to be adequately represented in the legal profession. In the great majority of states, and perhaps in all, the requirements are certainly far lower than they need be, even from this single point of view. The law schools themselves are divided. Some aim primarily to give the best possible legal education to those who can afford to pay for it, and make merely such incidental provision as is practicable for unusually capable students of modest means. Some aim to do little more than to enable as many applicants as possible to satisfy the low requirements for admission to the bar. Finally, between these two extremes stand a large number of schools that are open to the charge of maintaining entrance requirements and hours of instruction that can be criticised as imperfectly adapted to the successful accomplishment of either aim. Such has been the effect of permitting two ideals to clash, and looking to surrender or compromise to terminate the controversy.

In place of this, it is now suggested that all who are sincerely interested in the improvement of our present system of preparation for legal practice should unite in the pursuit of two distinct but not incompatible aims. Educational standards should by all means be raised; but likewise equal opportunity to satisfy

these raised standards should be provided to all classes in the community. The Washington Conference on Legal Education recognized the wisdom of this policy. It endorsed, with one modifying interpretation, a concrete plan for higher standards recommended by the American Bar Association, but at the same time it adopted the following highly significant resolution:

"Whenever any state does not at present afford such educational opportunities to young men of small means as to warrant the immediate adoption of the standards we urge the bar associations of the state to encourage and help the establishment and maintenance of good law schools and colleges, so that the standards may become practicable as soon as possible."

(*Eighth Resolution.*)

The concrete standards that were endorsed at Washington do not in all respects commend themselves to the writer as those which could most fruitfully be promulgated at the present time. But the general attitude of the Conference was in entire harmony with what he regards as his most important conclusion. It is left now to the responsible authorities in each state to determine whether the immediate adoption of these standards can be reconciled with the principle that access to the legal profession must be kept open to all social elements in the community. Recognition of this principle means, of course, that standards which fully ensure competency and character cannot be secured as quickly as we should like. But neither can they be quickly secured by a struggle between those who recognize the validity of this principle and those who do not. It is respectfully submitted that the effort to harmonize these two points of view cannot fairly be ascribed to a feeling that political considerations stand in the way of promoting, by all practicable means, higher standards for the training and admission of every type of lawyer.

—*Alfred Z Reed.*

522 Fifth Avenue New York City, January 5, 1923.

Lawyers' Seminar in Jacksonville

Programme Stimulates Professional Interest in Florida's Legal Problems—In Illinois Secretary Stephens Conducts a Bar Lecture Bureau

"The law is a learned profession." This was the declaration with which Chief Justice Taft opened his address to the Conference on Legal Education held last February in Washington. His second declaration was, "The law *is* a learned profession," and his third was even more emphatic in shifting the emphasis, thus: "The law is a *learned* profession."

These words come to mind on receiving from the Jacksonville (Fla.) Bar Association the programme of the Jacksonville Lawyers' Seminar, which follows:

Jacksonville Lawyers' Seminar

The Jacksonville Bar Association has arranged a Lawyers' Seminar. The Seminar will hold four meetings, as follows: November 2nd, 9th, 16th and 23rd, the first four Thursdays in November.

The hour for these meetings will be four o'clock in the afternoon. This hour is more convenient than an evening hour, and less hurried than a luncheon. By marking up these appointments in advance, the Seminar will not conflict with other matters.

Through the courtesy of the Old Colony Club, the Seminar will meet in the rooms of this Club in the Mason Hotel.

The subjects, speakers, and references for advance reading are:

November 2nd:
SUBJECT: SUGGESTED IMPROVEMENTS IN FLORIDA STATUTE LAW.
SPEAKER: MR. GEORGE C. BEDELL.
Reference: *Revised General Statutes of Florida.*

November 9th:
SUBJECT: QUIRK, GAMMON AND SNAP.
SPEAKER: COL. W. E. KAY.
Reference: *Ten Thousand a Year,* by Samuel Warren.

November 16th:
SUBJECT: ADMINISTRATIVE LAW.
SPEAKER: MR. E. J. L'ENGLE.
Reference: *State v. A. C. L.,* 56 Fla. 617; 6 R. C.L. 177 *et seq.*; 12 C.J. 844 *et seq.*

November 23rd:
SUBJECT: DECLARATORY DECREES IN FLORIDA.
SPEAKER: MR. H. P. ADAIR.
References: 12 A. L. R. 52, note; *State v. Grove*, (Kan.), 201 Pac. 82.

A reading of the references before attending the respective meetings will make the principal addresses more valuable and interesting. Questions and discussion by those in attendance will be invited.

Testing A New Idea

Lawyers occasionally meet to discuss legal and legislative problems but rarely if ever have the lawyers of a locality framed a set programme of this sort. The matter appears to be of no slight consequence. It is easy to make an interesting programme for a state bar association, because those attending have laid aside professional cares and are of a receptive mind.

But the problem of making the local bar association meeting interesting, stimulating, possibly instructive is one not yet solved and, in fact, hardly realized. It should be realized because it is of very great importance. The lack of proper programmes for local bar association meetings is the principal reason for the failure to hold these meetings regularly and for the perfunctory nature of the few that are held.

Good fellowship is not enough to make such meetings successful because the members of the local bar who care to see each other have too many other opportunities If they are to be induced to turn out specially for a bar meeting there must be a greater inducement. The dinner followed by impromptu remarks is commonly relied upon for this inducement, but often with little success. The busy lawyer and the serious minded lawyer are likely to remain away from such meetings.

Consideration of such facts doubtless had something to do with the proposals several years ago for a lawyers' seminar, by Mr. Henry C. Clark of the Jacksonville bar. His suggestions looking to the adoption of the plan by the bar universally were published in the JOURNAL (Vol. III, No. 5) under the title "Building Up the Law." Or it may be that the originator had in mind only the advantage to accrue to the law through the discussion of statutes and decisions. This is of course the larger side. But until the smaller bar associations find a means for securing the attendance of members there is no opportunity for the discharge of the profession's duty in scrutinizing law in the making and assisting courts and legislatures with expert counsel.

Publicity Favorable to the Bar

Reports published in the Jacksonville papers prove that the seminar, at the time this is written, has more than justified the hopes of its founder. The attendance at meetings has been generous. An interesting byproduct has been the publicity given by the papers. The reports have been very full, the Florida Times-Union devoting four and one-half columns to Mr. L'Engle's address of Nov. 16 on Administrative Law. While there are not many lay readers who will profit by reading a technical legal paper they cannot but be impressed by the fact that "the law is a learned profession" and that the local bar is devoting thought to legal problems.

An integration of the profession. is surely on its way. In a number of states the building up of the state association has been seen to call for the building up of the locals. In Washington the county bar associations have been admitted *en masse* to the state association. In Ohio a special secretary is employed in securing members. In Illinois district associations have been created to afford greater intercourse than is possible through a single annual state meeting. The meetings of the district associations are held mainly for the purpose of discussing public questions.

Mr. R. Allan Stephens, secretary of the Illinois State Bar Association, has realized very keenly the importance of stimulating the profession by making local meetings interesting and profitable. He came to the conclusion that the study of serious topics would interest lawyers and arranged for speakers on a number of subjects of current interest and offered their services to the local associations.

There have been, during the past two years, many profitable sessions. Secretary Stephens has in fact been conducting a little lecture bureau, and with promising results.

The Illinois plan has its merits, since it brings to every willing county bar, however small, one of the ablest practitioners in the state in the particular field of law to be considered. It is not competitive with the Jacksonville seminar plan worked out by Mr. Clark. There is no reason why both should not be encouraged in every state.

Illinois Rejects Proposed Constitution

Cook County Court Consolidation Practically Escapes Criticism in Storm which Sweeps New Instrument into the Discards

The first constitution voted on in fifty-two years in Illinois was rejected December 12 with an adverse majority of over three-fourths of a million votes. The proposed constitution was in important respects a better one in the matter of judiciary organization and powers than any that has ever been drafted. It provided a single trial court for Cook County's three million people, thus grappling with one of the most pressing problems of our times in an intelligent and courageous manner.

There is ground for congratulation in the fact that the intense and almost universal dissatisfaction with the constitution spared the unification of Cook County courts. There was a little opposition to placing the power of appointing chief justices in the Supreme Court, but no critic objected to the unification of all the courts of record into one. This unification doubtless did inspire the fight against the constitution as a whole by clerks of courts whose offices would be abolished and by twenty-five of the judges of the Circuit and Superior Courts, but none of these objectors openly made any point of the consolidation. The essential feature of unification and orderly structure appeared to be incontestible.

The chief criticism of the judiciary article was that it conferred rule-making power on the Supreme Court and also empowered that tribunal to appoint judges of the Appellate Court. The jealousy of the Supreme Court is on political grounds. The limitations on legislative power, the weakness and inefficiency of the legislature and the abundance of statutory regulation in the old constitution have all contributed to make the Supreme Court final arbiter in many political struggles, and as such it naturally arouses jealousy.

The tremendous majority against the constitution proves one thing—that it is impossible in such a state as Illinois to secure adoption of a constitution submitted to a single vote. Such a unit submission results in uniting all dissatisfied persons. It further enables every opponent to assign a false reason for his opposition, so that special interests can masquerade under patriotism, or what not. No form of politics makes stranger bedfellows than the unit vote on a constitution in a state as populous and diverse as Illinois.

The convention hung together for nearly three years and so worked out necessary compromises. But the electorate gleefully rejected the compromises, each side expecting to get a second chance and a larger share. The more irritating subjects should have been exposed to separate votes, but the delegates believed that the electorate would swallow some unpalatable features along with the rest. This was an estimate not tenable since the failure of New York's constitution in 1915.

The greatest difficulty which confronted the convention, one which nearly wrecked it, was in determining the representation to be accorded to Chicago. Under the old constitution the metropolis will in a few years be entitled to more representatives in the legislature than the rest of the state. In view of this the legislature has refused since 1900 to redistrict in accordance with the constitution. The com-

promise as worked out provided that Chicago should be permanently limited to a minority of the senate.

A huge metropolis is an anomaly in a state. Except for national purposes it should not be part of a state the remainder of which is different in every respect. But it is readily possible to reconcile the anomaly on this theory—that the city should have a large measure of home rule powers, and in return therefor should accept a permanent limitation of representation. It is intolerable that either city or country should dominate the other, for that is the antithesis of self-government. This principle was skillfully applied in the proposed constitution, but it did not by any means forestall opposition.

Permission to the legislature to adopt an income tax law probably proved the most damaging argument in the hands of unscrupulous opponents. It was intended by the convention to enable the state to reach some ten billion dollars worth of intangible property which is escaping taxation. But the masses were easily persuaded that this was a scheme to load an additional burden on their shoulders. There has probably never been such a mendacious campaign in the history of the country, a natural consequence of permitting a popular vote on an abstruse and many-sided subject with intense personal interest free to inject every kind of prejudice and misrepresentation.

In every large and diversified state there should be a separate submission of questions which arouse feeling. There should be also as a preparation for voting an understanding of the defects of the existing constitution. In Illinois both of these principles were ignored. The people do not realize that the old constitution is a daily curse in hundreds of ways. They have been fed up with stories of how mighty they are and "booster" talk but have not been taught the simplest facts concerning their own state. In consequence of this many evils must be endured indefinitely which would have been exorcised by the proposed constitution.

Vol. 6 APRIL, 1923 No. 6

Journal of the American Judicature Society

To Promote the Efficient Administration of Justice

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"We must train ourselves, and educate the public to the idea, that the object of judicial administration is not the advancement of private interests, but to do justice; and justice has ever been regarded as the surest foundation of an enduring state. We must build up a sentiment which emphasizes trust and confidence, rather than dishonesty, dilatoriness and chicanery."

William W. Potter

Published Bi-monthly from 31 West Lake St., Chicago

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To Promote the Efficient Administration of Justice

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Bulletin IV-B—Second draft of Metropolitan Court Act. Court organization for large cities. Pp. 94.

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The Municipal Court of Chicago, historical and descriptive. PP. 48.

Our Contributors

Two topics on which very little has been written are discussed in articles in this number. The explanation of the operation of a Supreme Court sitting in two divisions by Chief Justice Emmett N. Parker is especially pertinent, in view of the comparative failure of the intermediate appellate court. Within a few decades most of the states must provide for an increase in appellate forces. The experience of the Supreme Court of Washington in the article referred to shows the economical and efficient way of achieving this.

The article on disbarment, while written for the Iowa bar, is a valuable contribution to the small stock of writing on this subject. This would be an excellent topic for a wide research.

Intelligent interest in criminal law enforcement will be promoted by the thoughtful article on this subject by President Reynolds of the Institute of Criminal Law. The argument of ex-President Potter of the Michigan State Bar Association for a unification of courts in a state is one of the most convincing which has been written. Mr. John M. Maguire's study of judicial relief for the poor makes a valuable addition to the literature of this subject. To all of these authors and to editors who have consented to republication this JOURNAL extends its thanks.

The American Law Institute

The Juristic Center movement fostered by the American Law School Association, previously reported in this JOURNAL, resulted on February 23, 1923, in the chartering of the American Law Institute. Thus begins the most ambitious project ever voluntarily undertaken by the bar of any nation. The Institute represents the hopes of bench, bar and teacher that a clarification of substantive law may be achieved. That this work involves infinite effort, that it implies endless struggle, that it calls for liberal endowment, and that it carries no positive assurance of complete success is admitted on all hands.

The undertaking arises both from the extreme need of the situation and from a growing spirit of public service. We are confronted with hopeless complexity and confusion in our law if the courts of last resort, half a hundred in number, are to continue to grope for the appropriate rule with no influence making for unity. This situation illustrates the saying of Professor Kocourek that "Law begins and ends in discretion." In a primitive state of society there is no body of law to guide the judge; we approach the same condition of things now through the multitude of conflicting rules which may be cited on many points, and which, by their diversity, force the judge to fall back again on discretion. In this situation the lawyer cannot with assurance tell his client how to conduct his affairs in accordance with the law.

Out of this welter of decisions there is no escape for us by the easy route of imperial edict. The way pursued in Rome, in France, in Germany and in Japan is closed to a people, however determined to be politically unified, whose legislation originates in half a hundred sovereign states. No one of these states could conceivably accomplish the reformation alone, or could powerfully influence its neighbors. It must be a joint action. While the acceptance may be casual and sporadic, the critical and creative work of restatement must be through a nation-wide co-operation. This means that it must be through the bar, for the several states as such cannot be brought into co-operation. And it must be endowed otherwise than by Government appropriation, because it must be free from dictation on the part of the appropriating source.

The Bar which now assumes the responsibility thus clearly resting on it may

be considered tri-partite, composed of practicing lawyers, judges and law teachers. The development of the teaching profession as an independent vocation has brought to the Bar a growing body of lawyers who, for a considerable time, have been exerting a needed influence. They approach the problems of the law, not in order to support a thesis, but in the scientific spirit. They cultivate the impersonal view.

The fact that the law teachers have a critical, but dispassionate, outlook upon the law, that they alone trace its unities and relations and correlate it in a system, and that they can, with no sacrifice to any duty, devote time to intensive research, implies that they will produce the drafts of restatement which will then be subjected to the study and criticism of judges and practitioners.

Twenty years ago so few were the lawyers devoting all of their time to teaching that this work could not have been undertaken. The task, in fact, has been waiting for a decade or more for the development of the specialist. It is certain that each decade in the future will see an increase in the number, and possibly an increase in the average capacity, of these legal savants. The new movement implies rather co-operation on a nation-wide scale of all the productive and critical talents of the entire profession, rather than the writing of individual treatises.

There is such dire necessity that even the most skeptical must nevertheless welcome the attempt. Even the movement's by-products would justify the cost, which is insignificant when compared with public expenditures in fields promising gains less important. But there is room for expectation that the tide setting toward diversity in American substantive law will be reversed, and that a trend toward unification will be started. The work will tend to build its own road, for it will be an education in itself, and the assumption of the public duty will stimulate and inspire the entire profession.

Mr. Elihu Root, who has furthered this movement at every step, becomes honorary president of the Institute; George W. Wickersham, president; Justice Benjamin Cardozo, vice-president; William Draper Lewis, secretary, and George W. Murray, treasurer. The directors number twenty-one, with an authorized increase later of not more than twelve members. The Institute was incorporated under the laws of the District of Columbia.

Give Judiciary Greater Power

Efficiency Organization for Courts Points Way Out of Dilemma—Curtailment of Judicial Power a False Solution

[President William W. Potter of the Michigan State Bar Association (1922) in his annual address discussed the administration of justice with characteristic directness. The following portion of his address is reprinted with permission from the Michigan State Bar Journal. Vol. II, No. 1.—*Editor.*]

Your president will spend no time in extolling the nobility of the legal profession. It must satisfy us, or we would abandon it. I wish to call your attention to some things well known to all, and to suggest possible remedies for them.

* * *

When the American Constitution was adopted, church and state were separate. We created probate courts, with jurisdiction over the administration of estates and with such kindred jurisdiction as was conferred upon them by statute; we transferred the jurisdiction over divorce to courts in chancery, and continued or established courts which correspond with the king's bench, common pleas, equity courts, and courts martial, with subsidiary

justices courts; and here American judicial development stopped.

No great practical judicial reform has succeeded in America since the adoption of the American Constitution.

No form of action has been created not known and understood prior to the establishment of the American government. Forms of procedure have been simplified, in some cases at the expense of precision and certainty, but the forms of Blackstone are as good now as those of the Michigan Judicature Act.

Notwithstanding, by the Constitution of this state, it is made the duty of the Supreme Court by general rule to establish, modify and amend the practice in such court and in the circuit courts and simplify the same, and this duty has been emphasized by statute, the Supreme Court has, in this particular, apparently shirked its duty and responsibility and permitted the legislature to usurp this sphere of judicial activity especially conferred by the Constitution upon it.

Every set of court rules adopted by the Supreme Court of the State of Michigan governing the practice in that court, or in the circuit courts, has been prepared and submitted for adoption by the members of the bar.

While pleading, practice and procedure have, in England, been modified and simplified, we are still practicing substantially in accordance with the principles familiar to Blackstone and to Chitty.

As a result of this abdication by the Supreme Court of control over the principles of procedure and practice, it has permitted itself to be bound by statutory rules prescribed by the legislature, and, as a court, in this particular, has practically ceased to function.

It has chosen to follow statutory rules even at the expense of justice.

In this state approximately 100,000 cases are instituted each year. Of these cases, about one per cent reach the court of last resort. The other 990 cases out of every 1,000 so started are disposed of in inferior courts. If we are frank with ourselves; if we admit here what we acknowledge elsewhere; if we recount our own experiences; if we listen to the expressions of opinion by practitioners at the bar in every county in this state, we discover an enormous number of outrages upon litigants committed by ignorant and incompetent justices and judges exercising judicial power. While lawyers profess to hold up their hands in horror at flagrant violations of justice, they nevertheless generally recognize that these things exist, but instead of attempting reform, they indulge, when affected, the constitutional prerogative of the trial lawyer.

Although it may be the duty of the lawyer to uphold the dignity of the bar and the honor of the court, he must be blind indeed who believes either that the courts are keeping abreast of the times or enjoy the confidence of the American public.

Though the lawyer is not worried because he knows the remedy, and the court of last resort is not concerned because it deals with only one per cent of the litigation instituted, the average man is frequently compelled to submit to injustice or to spend an unnecessarily large sum in order to vindicate his rights.

People Dread Litigation

So great is public dissatisfaction with trial courts that, instead of being the objects of veneration and regard, they are avoided by everyone who has his own business interests at heart.

Every practicing lawyer is familiar with the suspicion with which courts are regarded. The delays in the administration of justice and the manner in which the rights of liberty and property are bandied about has led intelligent and progressive men in practically every trade and department of commerce to organize tribunals for the administration of justice. This is true of lumber dealers, hay dealers, grain dealers, fruit shippers, potato shippers, coal dealers, furniture dealers, and many other branches of commercial enterprise. It is true of the vast membership of fraternal societies, of church societies, of racing associations, and of associations of professional men. All these resort to their own tribunals to settle dispute from choice, and to the legally constituted courts only when compelled to do so.

The public represented in the legislature recognize the inherent weakness of our judicial administration. Courts of arbitration and conciliation are everywhere springing up, and their most striking features are that no record of their proceedings is kept and that the arbitrators are not bound by the rules of evidence, but may hear such testimony as they may desire.

It is not alone in the creation of new tribunals, which are not legally recognized, that a profound change has been taking place, but the whole doctrine of master and servant, in so far as that relation involves rights and liabilities growing out of negligence, contributory negligence, assumed risk, and its corollary, the negligence of fellow servants, has been removed from the sphere of adjudication by courts and conferred upon an independent administrative tribunal.

The law governing the relative rights of gas companies, electric light companies, telephone companies and railroad companies as against the public; the determination of just rates, practices and conditions of service is primarily removed from the determination of courts and vested in an administrative tribunal.

Notwithstanding the removal of great branches of administration from the courts, the same complaint voiced by the Mirror of the Justices, of delay in the king's court, is now everywhere echoed against legally constituted judicial tribunals.

So great has become the volume of these complaints, and so acutely have they been felt by the people, that many remedies have been advanced.

Several American states, notably Arizona, California and Oregon, have extended the recall to judicial officers. The object of the recall is to make the judiciary subservient to the will of the legislature. Its advocates generally deny the right of the court to declare statutes unconstitutional and thus uphold the will of the people against the desires of their servants. Its exercise may disgrace faithful public servants, and it tends to destroy that independence which is the distinguishing feature of a strong judiciary. Condemned by three thousand years of experience before it was recently resurrected and made a political issue in a presidential campaign, fortunately in this state the recall of judges of courts of record and courts of like jurisdiction is prohibited by the Constitution.

The recall, not of judges but of judicial decisions, has been frequently urged, and it, too, has been dignified by being made a political issue. No one now seriously contends that an appeal should be made from the decision of the judge to the vengeance of the multitude, as was permitted by Pilate when, listening to the murmurs of the masses, he surrendered the Savior to the brutality of the mob. In civilized states under constitutional government the same results may be obtained by constitutional amendment, as was done in this state after the decision in Pingree v. Auditor General and in the United States after the decision holding the income tax to be a direct tax, which must be constitutionally apportioned among the several states according to their respective numbers.

Foolish Remedies Proposed

Again, it is contended that the doctrine of *stare decisis* should be abolished by constitutional amendment. This was the view of the great Justinian and of the celebrated philosopher, John Locke. But right reason is justly authoritative and wrong reason may in the long run be set aside by judicial decision, legislative action, or constitutional amendment.

It is sometimes contended that courts should be deprived of the power and authority to declare statutes unconstitutional; but this would destroy the superiority of constitutional government, consisting in the power and duty of the court to maintain the supremacy of the will of the people as expressed in the Constitution against that of their servants expressed in legislative action.

Then there are those who contend that the right to declare a statute unconstitutional is a legislative power akin to the executive veto, and under the division of governmental powers prevailing in our Constitution cannot be constitutionally

exercised, and that it is upheld only by the aristocracy of the robe, in contempt of public right in a constitutional republic.

So general, widespread, and powerful has been the sentiment for judicial reform; so plain is it that judicial procedure in the United States represents the arrested development of an important phase of progressive civilization, that the chief justice of the Supreme Court of the United States is making an investigation and effort to simplify judicial procedure and dispatch business in the federal courts by methods akin to those which have for years been in use in England.

Says Roscoe Pound, dean of the Harvard Law School:

"For one thing, we need a modern organization of our courts—a problem to which the American Judicature Society is devoting much attention. Again, there is need of organization of judicial administrative business. If we think of the administration of justice as the social objective, we can no more attain it with the judicial armament and the clerical system of judicial business inherited from seventeenth-century England and shaped in the pioneer, rural, agricultural communities of the first half of the nineteenth century, than we may expect to conduct a military campaign today with the mule trains and the commissariat arrangements of the Civil War. But beyond this organization of the courts and of the administrative officers immediately connected with the courts we need a real ministry of justice charged with the duty of active and continuous effort to make the law effective for its purpose, as the courts are charged with the duty of effective administration of the law when provided. The legislature will give the formal sanction. But someone must do the preliminary study, must perceive the leak to be stopped, must discover the anomaly to be pruned away, must find the directly advantageous practice to be extended, the conflicts to be abated, and inconsistencies to be reconciled. So long as this is everybody's business it is nobody's business, and so much of the pressure for legislation comes from purely selfish motives that one who essays a real improvement out of pure public spirit is not unlikely to be met with suspicion. Thus he becomes discouraged, and lacking any selfish motive for persistence, gives up, where the advocate of legislation for some particular group or class continues the pressure and succeeds."

We must train ourselves, and educate the public, to the idea that the object of judicial administration is not the advancement of private interests, but to do justice; and justice has ever been regarded as the surest foundation of an enduring state. We must build up a sentiment which emphasizes trust and confidence rather than dishonesty, dilatoriness and chicanery, and this can be done only—

(a) By charging the bar with the duty and responsibility of purging its own ranks, preventing improper persons being admitted thereto, elevating the requirements to admission, and upholding the highest ideals of the profession; and to that end, I urge your consideration and approval of the bill introduced in the last legislature of Michigan to provide a self-governing bar, a copy of which was appended to the report of the Committee on Legislation and Law Reform at the last meeting of this Association.

(b) By the abolition of the present judicial system and the supersession of the Supreme Court, circuit courts, at law and in equity, probate courts, juvenile courts, municipal courts and justices courts by one consolidated court, with plenary jurisdiction, divisible by its own acts into as many parts and divisions as the exigencies of the business to be disposed of demand, whether civil or criminal, juvenile, probate, or equity, whether dealing with rates, torts, felonies, or industrial accidents; composed of men of ability and intelligence; that the administration of justice may no longer be treated with derision and contempt; that ignorant, incompetent and dishonest judicial officers may be but reminiscences of the past; and that the administration of justice shall command the respect and admiration of the bar and of the public.

Businesslike Organization

Such a court should be organized in an effective and businesslike way, with administrative heads free from judicial duties who could devote their entire attention to developing the operative efficiency of the various branches, devising better methods of procedure, assigning judges to those branches of the court and to those localities where they will be most effective and are most needed, and publishing judicial statistics showing as fully as possible the results accomplished by the different branches and by the different judges

in the various judicial divisions of the state. The judiciary is the one department of state which publishes no data bearing upon the efficiency of its work, and without such data there is no adequate basis for judging how well it performs its duties or what changes are necessary in order to increase its efficiency. Great Britain has long published judicial statistics. They are as essential to the effective administration of justice as are the annual financial and operative reports of business companies to the successful conduct of such enterprises.

I would provide for effective cooperation between the bench and the bar in improving the service rendered by the courts, setting up administrative machinery for making the rules of procedure responsive to the needs of the people. British procedure for seventy-five years has had a flexibility which has enabled it to keep abreast of the requirements of the times through gradual modification. Rules should not be retained until they become absolutely unworkable, but should be changed whenever improvements are needed, and no unnecessary obstacles should be thrown in the way of continuous progress in reforming procedure in all its branches. I would repeal the Judicature Act in all its parts, create and enact a short practice act, leaving the details to be filled by the Supreme Court, as contemplated by the Constitution, that practice may be amended, modified and simplified. I would provide for settling issues prior to the taking of depositions or of testimony, so that as to all facts not admitted and subsequently proven the party refusing to admit the same shall pay the cost, that the courts may cease to be the conduits of private favor and become instrumentalities for the administration of public justice.

These matters have received careful consideration from many committees and associations. Something should be done to allay the prevailing criticisms of our judicial system, re-establishing the jurisdiction of our courts, and rehabilitate them in public favor; and, it seems to me, the way to reform lies, not in curtailing the courts' constitutional powers, or in hampering their functions by legislation, but in extending their powers, abolishing useless and cumbersome rules, placing the disposition of the 990 cases out of every 1,000 in the hands of qualified judicial officers, elevating the standing of the bar and the tone of the judiciary, and above all, in making the judiciary a righteous and effective force for the prompt and intelligent administration of justice. This, it appears to me, will check the criticisms of a dissatisfied public, give us better judicial administration, and advance the cause of truth and justice. *William W. Potter.*
Lansing.

Character Qualifications and Disbarment Proceedings

[Reprinted, by permission, from Iowa Law Bulletin, Vol. VIII, No. 2.]

From all thoughtful lawyers comes the warning that the profession must awaken to a new consciousness of its position and of its responsibilities. When the demagogue and the propagandist find a fertile field in the world-wide unrest, careful and thoughtful people everywhere turn to the lawyer for aid and counsel to weather the storm. In such times, the statement that the lawyer is a public servant takes on an added meaning. His is the responsibility to establish in the public mind confidence in the courts and even in the government itself. But before this is possible the public must have faith in the legal profession as a whole.

Everyone realizes how important it is to

1. The problem of the unfit practitioner is nation wide and it has aroused correspondingly widespread attention of late, especially that side of it dealing with an effort to increase the requirements for admission to the bar. The present article dealing with the other side of the problem,—that of ridding the bar of those undesirables who succeed in obtaining admission,—while directed particularly to Iowa conditions, is by no means limited to Iowa in its application. The energy and thought being so generously expended all over the United States on the matter of keeping out the unfit might very profitably be extended on an equally broad scale to the matter of disbarment.—Ed.

know something of the character of those who seek admission to practice, so that, as Elihu Root recently said, "you can keep the fellows out that are merely trying to get an opportunity to blackmail and grind the face of the poor, merely seeking an opportunity for more successful fraud and chicanery by having a law shingle."

That the bar itself has felt the pressure of public opinion and has come to a realization of the necessity of cleaning its own house was brought out repeatedly in the Conference of Bar Association Delegates held at Washington last February to discuss standards for admission to the bar.[1] There must be a tightening up of standards all along the line if the responsibility of the profession to the public is to be met, yet all agree that it is most difficult, if not impossible and inpracticable, to attempt to apply any real or searching character tests for admission into the profession.

At the Conference above mentioned, Mr. Root, speaking of his experience as a member of a character committee, with reference to admission to the bar, said:

"Year after year we used to sit, and all the applicants for admission to the Bar came before us and presented their papers and submitted themselves to such examination as we saw fit to make regarding their characters. And every year, when it was all through, we were compelled to confess to each other that we really did not know anything about the character of nine-tenths of the young men who came before us. They would get somebody to sign the necessary papers, and they would furnish certain formal statements about their careers. A young fellow just applying for admission to the Bar has not much of a career. It is very difficult to tell much about his character. We could not keep a young man out because we did not know much about him. It would not be fair to deprive him of his chances. Nevertheless, I had, we all had, an uncomfortable and unhappy feeling that we were admitting to the Bar each year some scores and hundreds of young men without any warrant whatever for believing that they had the character that is the most essential thing in the administration of justice." [2]

Unless one has committed some overt act showing him to be unfit, it is almost a matter of course that the evidence of good moral character which he presents should be accepted without question. And this is perhaps as it should be. But whatever educational requirements may be set up as standards for admission to the bar, though they may tend to keep out the weak and the poorly prepared, they will not assure such character qualifications as are absolutely essential to the legal profession if it is to have the confidence of the public, be able to serve the public and justify its existence as a profession. The higher the intellectual qualifications and training of the lawyer, the more dangerous does he become if he turns out to be unworthy of the trust reposed in him in his professional capacity. No one doubts that the smart crook is more dangerous than the stupid crook—more dangerous to his client, and more dangerous to the reputation of the profession as a whole.

A few years ago we rather freely took it for granted that every attorney would look after his client's interests, and laid stress upon his duty to the court in the administration of justice. Today we are coming to realize that we should not assume even this loyalty to the client. We must be sure of it, for certain it is that one who does not first feel such a responsibility is not going to worry about his duties to the profession, the court, and the public. Nor can the profession expect the confidence and respect of the people so long as they know of unworthy members who are premitted to remain within its ranks. Whether the effort of character committees to keep out the unfit be reasonably successful or discouragingly ineffective, the work is at best only half done, for it is only after the opportunities in actual practice have come, that the real character of the applicant can be known.

Present Methods Inadequate

Although ninety-nine lawyers out of a hundred may be honest and upright, the public has been prone to class all lawyers

2. Proceedings of the Conference, p. 19.

as crooks because of the defections of the unworthy few. When one such character is permitted to practice law the layman is most apt to conclude that all lawyers are crooked, else they would not permit a dishonest or tricky lawyer to remain one of their number. And, so long as the bar has the right and power to disbar for unprofessional conduct, it cannot well complain if it is charged with responsibility for the character of its membership.

It is easy to talk of the duty of the bar to clean its own household,—and that it has such a duty no member of the profession should deny,—but that as a practical matter the bar is not likely to be cleared of its undesirables through our present methods has already been too well demonstrated. Just ask for volunteers to conduct disbarment proceedings against a fellow attorney, and see what response you will get. Better yet, ask one of the few attorneys who has once been engaged in such a prosecution if he is willing to act again. The question is not whether we *should* be willing to undertake such an unpleasant duty, but whether we *are* willing to do it, and are doing it.

If a lawyer against whom disbarment proceedings are brought is a man of any force or ability, the local enmities that are engendered are of the bitterest kind. Such a proceeding is not like an ordinary hard-fought litigation where the lawyers will shake hands when the case is done. He who prosecutes a disbarment proceeding must not only have an extreme degree of courage and be unmindful of the enmities that will arise, but he should also be professionally and financially independent so that he may not suffer as the result of such hostilities. The personal element is no doubt less in large cities than in smaller communities where the members of the bar are better known to each other.

Some time ago a prominent lawyer spoke to the writer about an attorney who, he said, "ought to be kicked out of the profession," and on being asked why disbarment proceedings were not instituted, answered, "No respectable lawyer wants to get mixed up in such a dirty mess." The question is not whether this is the attitude we should take; it is the attitude we are taking. In the meantime the public is looking on and passing judgment.

There is also another side to the disbarment proceedings as they are now conducted which must be taken into consideration. A lawyer called upon to defend his professional character is like a woman called upon to defend her private character. Though a trial may establish conclusively that the charges are unfounded, yet in either case the public always remembers that the character was questioned. Infinite harm, therefore, may be done to a lawyer's professional reputation through local proceedings instigated because of enmities or jealousies. Perhaps no plan suggested can get away from this danger entirely, but such damage is altogether too easily done under our present method of handling disbarment cases.

Some eight years ago a committee of the Iowa State Bar Association, under the leadership of the late Justice Deemer, reported a plan for the disbarment of attorneys. This plan is set forth in Rule XI of the By-Laws of the Association, and provides that the Association may order its Grievance Committee to institute disbarment proceedings, the expense thereof to be borne by the Association. During the eight years that this provision has been in force no prosecutions have been conducted under it. This does not mean that the committee has been inactive, for, to the writer's knowledge, hardly a year has passed without the investigation of several complaints. Probably, in most cases, there has been gross neglect rather than active misconduct, and yet, both in the cases where the neglect has been such as to forfeit public confidence, and in those more outrageous cases of deliberate misconduct, the most that has been done has been to compel the wrongdoer to make restitution. Every crooked lawyer, once he is caught, most readily promises to be good in order to avoid prosecution. To exact such a promise from a thief and to make him give up the stolen goods may serve some useful purpose by benefiting the individual who has been fleeced but the public expects something more, it expects the wrongdoer to be dealt with, and feels that he is being protected if he is not punished. By the

present method the wrong to the individual may be righted, but not the wrong to the public.

Prosecutions by a bar association committee are never satisfactory for it is a constantly changing body having no official standing. Its members ordinarily hold office for a year only and are likely to be widely scattered so that any action or investigation is necessarily carried on very slowly by interchange of letters. After some such correspondence extending over a considerable period they generally hold a short conference during the annual meeting of the association, and not being able at such time to go into the cases fully enough to justify any adverse report on a question of so serious a nature, they are very likely to adjust matters so that they may report to the association and be discharged, or at most, turn the matter over to the incoming committee for further investigation, in which case it goes through much the same process again. Under such a procedure any offer of the accused to make restitution is gladly accepted as a way of clearing up the work of the committee and permitting the committee to make a report which will be "accepted and placed on file."

It is asking a great deal of any particular attorney to leave his business and the business of his clients to conduct disbarment proceedings. Even if it be argued that we should be willing to do it for the good of our profession, at least, under the present system, we have not done it; and we are safe in saying that the nature of lawyers is not going to undergo any radical change. Ask yourself this question, "Do I want to prosecute such a case, with all its enmities and disagreeable features and with little or no compensation?"[3] Do you not have the feeling that it is unfair to single you out for such a duty when your responsibility to the profession is no greater than that of all the other members of the bar?

The State's Interest

How then should such cases be conducted? Does the state have an interest in the matter? It licenses the attorneys to practice, and makes them officers of its courts. It did this originally by a local committee and many of the older lawyers remember how the candidate was required to treat the local bar to an oyster supper or such other refreshments as suited the spirit of the community. But too many local and personal influences came in to make this a proper and efficient method of determining a matter in which the whole state was concerned. The state as a whole has an interest in the matter of admitting to the practice one who presents himself as a candidate, and the state as a whole has an equal interest in getting out of the practice one who is abusing his privileges. In neither case should so important a matter be left to local influences or be influenced by local conditions.

By statute the attorney general is made the head of the Department of Justice and in recent years we have put upon him many duties as state prosecutor. Particularly have we put such duties upon him where, because of local conditions or prejudices, there may be a tendency to allow prosecutions to go by default. If the responsibility and duty of conducting disbarment proceedings were also placed upon the attorney general the whole investigation would be taken out of the conditions which have made our present procedure so ineffective. At present no lawyer can raise objection to the conduct of another attorney without at once bringing upon himself the obligation to prosecute disbarment proceedings. He must make good or shut up. The result is that he shuts up because the job is a bad one and most lawyers do not wish to bring it upon themselves. If, however, the burden of prosecution were put upon the attorney general, the cases that are worthy of investigation would be brought up more freely.

If an attorney is the one who makes a complaint he would probably be willing to discuss the matter fully and frankly with such an officer. Any layman who felt that he had been unfairly or improperly treated would be able to secure an investigation.

3. No compensation is provided by statute but a resolution of the Bar Association provides that the prosecution shall be conducted for such compensation as may be paid by the Association.

At the present time if he has a complaint he goes to some lawyer who, seeing what is ahead of him in prosecuting or in making public such a charge, usually attempts to pacify his client. The result is the layman's belief that lawyers have agreed to stand together, good and bad alike, for their mutual protection. It is true that complaints against lawyers should not be made unless they are well founded, for such complaints may result in great harm to the person accused. On the other hand, the wisdom of investigating complaints, and the necessity of so doing in a proper and careful manner, cannot be questioned. Unworthy members must be removed and the waning confidence of the public be reestablished.

In a number of states the trial of disbarment cases is directly under the control of the Supreme Court. This also seems a desirable arrangement assuring as it does absolute fairness and removing the case as far as possible from local influences and prejudices.

Our persistent failure to check up the few who are delinquent or who are guilty of active wrong-doing is a constant encouragement to such conduct. The young attorney struggling for a practice, seeing some older and perhaps more clever man "getting away" with improper schemes is apt to think that all lawyers do it and that it is a shrewd and commendable way to make a living. Every disbarment case which is conducted in a proper manner would act as a reminder of the ethics of the profession. It would start more lawyers to thinking and judging for themselves as to what is professional and what is unprofessional conduct. A few disbarment proceedings would do the profession as a whole much good, not only in ridding it of some unworthy members, by whom the whole bar is judged, but also by the restraint which it would place upon many who might yield to temptation.

It is a very worthy ambition to grant licenses only to persons of "an honest disposition"[4] but with all our care in the attempted application of character qualifications for admission to the bar we have found that any effective test is impossible. Everyone feels, perhaps the lawyers more strongly than any other class, that an apparently worthy young man should be given a chance. Our feeling has been such that we have resolved everything in his favor to let him in, which has been quite proper. But after he is in nobody is anxious to take the burden of getting him out, even though it is clear that he has entirely departed from those principles of conduct which he had sworn to uphold.

We are operating under an archaic system of disbarment which corresponds to the old methods of examination by a local committee for admission to practice. Everybody's business is nobody's business and until we fix upon someone this duty, as a part of the office to which he is elected, we will perhaps have no disbarment proceedings except in the most extreme and outrageous cases.

If the state is interested in the licensing of attorneys, if it considers it worth while to spend large sums for the proper education of lawyers, then certainly it must have a vital interest in seeing that improper persons are not permitted to abuse the license which it has issued. Then let the state make it the duty of its department of justice to investigate, and, if necessary prosecute such cases, and let the trial be conducted before the highest tribunal in the state. The prosecution of disbarment cases has been left as a privilege to the lawyer who wished to avail himself of it. It is not a matter of individual concern, but one in which the state as a whole is interested, and it should be the duty of the state, acting through state officers, to see that the character qualifications which it demands for admission to the bar, are maintained by every lawyer in practice, to the end that the requirement of "good moral character" may have a real meaning to the profession and to the public.

H. C. Horack.

University of Iowa.

4. "There may be a competent number of persons, of an honest disposition and learned in the law, admitted by the judges of the respective courts to practice as attorneys there, who shall behave themselves justly and faithfully in their practice." Del. Rev. Stat. 1915, ch. 112, sec. 10.

Criminal Justice; Its Simplification, Clarification and Better Adaptation

Brief Basis for Study of Criminal Law Problems Outlined by James Bronson Reynolds, Esq., President of the American Institute of Criminal Law

Judgments regarding improvements in the criminal law and its administration and their timeliness depend on one's appraisal of conditions. I, therefore, submit with apologies to the wise, an outline of present conditions in criminal law administrations as I view them, with conclusions drawn therefrom.

(1) Study of the Criminal Law

(a) *The law schools.* There is no law school in this country, I am informed, which employs a professor or instructor who gives exclusive attention to the criminal law. Nor is there any instructor who treats that subject as of more than secondary importance. Except for the work of Deans Pound and Wigmore and Pound the few valuable professorial contributions on the subject have resulted from extraordinary effort in time snatched from major studies.

(b) *The courts.* With few exceptions, judges presiding over criminal trials give only part time service thereto, civil cases receiving their major attention. It has been seriously argued that whole time attention to criminal cases makes judges blood-thirsty and vindictive. If greater knowledge of criminality and its problems with resulting greater power of discriminating judgment produces this condition the charge may be true, but such charge has not been made against the judges of General Sessions in New York nor of the consolidated Criminal Courts of Detroit.

(c) *The Bar.* The vast majority of lawyers abstain wholly from criminal law practice and from study of crime and criminal law problems. Criminal law practitioners excepting a few public prosecutors and a very few attorneys are of two sorts: First, those absorbed in aiding rich malefactors to escape from their just deserts. Such when successful usually do so through the technicalities, and deficiencies in the antiquated and cumbersome machinery of the law; second, those called shyster lawyers, who may be said often to differ from their clients only in that *they* are not under indictment. Neither of these classes is interested in the better adaptation of the criminal law to the needs of the time, nor in simplifying and clarifying its procedure.

Thus the law schools, the bench and the bar all fail to contribute to scientific study and criticism of the criminal law or to the improvement of its administration. I state this with high appreciation of the important contributions of a few judges, lawyers and professors of law.

(2) What Is the Present Condition of the Criminal Law?

(a) The criminal law during the entire Colonial period suffered from its mixed origin. The Old Testament in New England, the New Testament in Rhode Island and Pennsylvania, and the common and statute law of England were the main sources of American criminal law. Scarcity of lawyers and lay judges who trusted to their imaginations or their supposed moral sense for knowledge of jurisprudence and of civic duty deprived the nascent states for two centuries of constructive adaptation of the criminal law.

Dean Pound states that of the three justices of the Superior Court of New Hampshire after independence, one was a clergyman and one a physician. A justice of the Supreme Court of Rhode Island, 1814-1818, was a blacksmith and the chief justice, 1819-1826, was a farmer. When

James Kent became a judge in New York in 1791, he remarked: "We had no law of our own and nobody knew what (the law) was."

Civil and criminal law suffered alike from this condition, but the civil law was at least somewhat improved by able lawyers and judges; the criminal law has never received equal corrective service.

(b) The criminal law further suffered from the demoralizing influences of the unstable and lawless society of the pioneer period, whose influence was strong throughout the country until the Civil War, and in some parts of the country until the end of the last century. Opposition to social restraint in any form, unwillingness to allow the judges authority or influence in reaching verdicts, large powers for juries and, consciously or unconsciously, insistence on technicalities of procedure favorable to defendants resulted from a society strongly individualistic and jealous of its freedom of action.

A California farmer in the Eighties to whom a newly arrived Easterner expressed surprise at the freedom of action of the settlers, replied, "Well, Mr. Thacher, when you have been here a little longer you will find that we all do as we please, and we most of us do as we damn please." The genuine determination to protect the latter choice of conduct deeply influenced criminal law administration.

(c) After the Civil War trade unions and capitalists, both new forces, were strongly individualistic, a term often signifying disregard for all rights except their own. Both leaned towards sympathy for offenses in many cases charitably classed as self-expression, but more technically as breaking the peace, larceny or murder! I recall travelling to the Pacific Coast in the Nineties with a civil engineer of unusual ability, a college graduate, and of excellent law-abiding New England parentage. He asserted that he would be justified in murder if any one stood in the way of his "manifest destiny." Such men, Jay Gould, and Parks, the Labor leader, were types of their age and its attitude towards the criminal law. They sowed the wind and we are still reaping the whirlwind of their criminal anarchy.

(d) With the Twentieth Century a new spirit entered society. Capitalism and industrialism alike became more ready to use the criminal courts for their protection. Better judges and magistrates were elected or appointed and corrupt judges became rarer. But the most striking action of the decade affecting substantive criminal law was the attack on commercialized vice long tolerated as a necessary evil in spite of its universal debauchery of the police and of other deplorable consequences. In effect a new morals code was added to the criminal law, the age of consent of girls, once ten and twelve in England and in some of our states was in most states raised to eighteen years. State so called White Slave Laws, State Injunction and Abatement Acts against houses of prostitution were passed and to these were added two national laws, the Bennet law directed against importation of women for immoral purposes and the Mann Act against interstate commerce in vice. For the successful enforcement of the latter no one achieved so much as Mr. Wickersham while attorney general.. A nation-wide moral revolution has resulted and no large city in this country today tolerates conditions which twenty years ago were universal. A revolution of public sentiment as to morals resulted from a revolution of public sentiment as to social order. A new faith in the power of the criminal law to achieve was a further resultant.

(e) The first and second decades of the Twentieth Century in spite of the Great War, established it as the century of social reform which will not tolerate the lawless individualism of the Nineteenth Century and urges the protection of society in place of vengeance as the sanction of the criminal law. I venture to assert that at any time since 1900 a movement to reform the criminal law in the interest of efficiency, intelligence and humanity would have received popular approval and support. Certain reforms have been accomplished mostly along humanitarian lines. Children's Courts, Women's Courts,

Domestic Relations Courts, the Public Defender, probation of offenders after conviction, parole after imprisonment and the indeterminate sentence make a formidable list. The Ohio constitutional amendment allowing the prosecutor to comment on the silence of the defendant, the consolidation of the criminal courts of Detroit, the crime survey of Cleveland and the Crime Commission of Chicago, testify to public dissatisfaction with the inefficiency of existing criminal law and its machinery.

(g) In contrast with the apathy and even hostility to reform of the criminal law in this country in the Nineteenth Century stands the movement in England from 1820-1890 to abate the brutality of its substantive criminal law and to remove the technicalities of criminal procedure which had been used to thwart the brutality of substantive law. Both aims were accomplished and in these particulars the English criminal law is far superior to our own as an instrument to reduce crime and give respect for the law and the courts. But it is proper to remember that while the English criminal law has been reformed as to efficiency the social and humanitarian reforms in the law in this country are almost or quite lacking in England. Comparative studies would therefore be mutually profitable.

(3) Criminal Law and General Progress

(a) Sociology, psychology, psychiatry, penology, ethics, politics, and even medicine have raised problems since 1850 which concern substantive and procedural criminal law and their applications to society. The legal profession, the law schools and the judiciary have failed to see their relations to the law, to social and political security and to social progress. A few years ago the Court of Appeals of New York through its chief justice handed down a majority opinion, in an important industrial issue, based almost wholly on economic theories which possibly he had been taught in college forty years before, but which were probably not held by any economist of standing at the time of their utterance. Whether the majority opinion was right or wrong, the opinion was as discreditable a spectacle of ignorance as would be an opinion on corporation law which recognized no changes in the last forty years.

(b) Substantive criminal law, an evolution from the English common law has passed under the influence of all the historic forces mentioned above and those influences have been more potent than in relation to the civil law because the criminal law deals more directly with acts prompted by human emotions and sentiments. Yet these actions and reactions have been little studied or appreciated.

(c) Criminal procedure in its relations to the maze of ancient tradition and superimposed patchwork is little understood. When we consider for example, that the silence of the defendant was granted to prevent the crown from torturing defendants, we are appalled to find it continued in every state but one, though it chiefly operates to prevent the conviction of the guilty. I have been told by the police that more than any other cause it incites the application of the third degree, the very evil which in another form it was created to prevent.

(d) Yet as law is the foundation of orderly society so the criminal law, I submit, secures the operation of all other law. Constantly the civil courts, the people and the lawyers turn to the criminal law to sustain orders for specific performance or to punish failure of performance of orders of civil courts.

(5) Specific Problems of the Criminal Law

(a) Without venturing on further analysis, though it is a temptation to do so, I come to the problems of the Criminal law demanding solution.

(b) The most pressing task is a broad and comprehensive scrutiny of the criminal law, criminal procedure and present administration of both and the issuance of a careful diagnostic statement of their real defects. The administration of the criminal law suffers from wide-spread popular distrust and condemnation. Some

of this is warranted, much of it unwarranted and misplaced. It is often based upon limited personal experience, or newspaper criticism which may be sound or may be due to the hostility of some reporter who failed to obtain a story from a prosecuting attorney or an interview from a judge. Both the alleged offenders may have acted from wholly righteous motives of public interest.

(c) There is greatly needed a study of the substantive criminal law, its relations to the common law and development therefrom and from other forces which influenced the common law such as disputes with the Crown in the Seventeenth Century, Eighteenth Century political philosophy, anti-English prejudices following the Revolutionary War and pioneer life and early social and economic conditions in this country. Such a review would be illuminating and of important advisory value in the task of harmonizing and standardizing present confusing differences in the criminal laws of various states.

(d) A similar study of criminal procedure would be of no less value. It would show the atrophied state of various procedural devices which have outlived their usefulness and contribute to the cost of criminal trials and the inefficiency of their administration.

(e) An appraisal of reforms and changes in the administration of the criminal law in this country in the last twenty-five years would offer a shorter study of high practical value.

(f) A comparative study of criminal law changes and reforms in England and America in the Nineteenth Century and in the first two decades of the Twentieth Century would contribute to a profounder conception of the task of the criminal law and its more intelligent, more humane and more efficient administration. An analysis of the criminal law and criminal procedure as now administered might be considered to belong to this statement, but I have thought that such analysis belongs to the extended studies which I recommend. Numerous other detailed studies such as that of responsibility might be suggested.

(5) The Institute of Criminal Law and Criminology

(a) So far as we are aware this is the only organization concerning itself with the study of the criminal law. A criminal law section of the American Bar Association exists but its activities are limited to the annual meeting.

A Committee on Law enforcement of the American Bar Association reported at San Francisco in 1922 and was discharged. It made excellent suggestions as to the improvement of criminal procedure, but the report was defective in its almost complete lack of facts or reasoning to sustain its judgments and recommendations.

The American Prison Association, and other organizations are concerned with the treatment of prisoners after conviction and have a slight interest in trial procedure and criminal statistics. They have attempted, I believe, no scientific studies.

(b) The Institute of Criminal Law is directing the present demand for improvement of criminal law administration into sound constructive channels by promoting careful surveys of its administration in representative centers in different parts of the country. The foundations are being laid for a great national movement but our present funds do not permit us to do both the practical and scientific work needed.

A thorough examination of present criminal statistics, conferences with statistical authorities in various parts of the country and determination of what criminal statistics are and should be obtained through a National Bureau of Statistics have been undertaken to secure such accurate information as is obtained in England, Canada and the Continent but which we almost wholly lack.

These activities will be encouraged and certainly not injured, we believe, by the suggested activities of the Institute.

James Bronson Reynolds.
North Haven, Conn.

A Supreme Court With Two Divisions

Mr. Justice Parker Describes Organization and Methods of Work of the Supreme Court of the State of Washington

The jurisdiction of the supreme court of the state of Washington is almost wholly appellate. I shall ignore its original jurisdiction in the present statement of its organization and methods of work. As originally created by our constitution in 1889, the court consisted of five judges, the legislature being given constitutional authority to increase the number of judges and provide for separate departments thereof as occasion might require. In 1909, the number of judges was by legislative enactment increased to nine, and the court divided into two departments of five each, the chief justice presiding in each department when present at the sitting thereof. While it is legally possible for the two departments to be in session at the same time, since three judges constitute a quorum of a department, the work of the court is so arranged that this seldom occurs. Theoretically, the court is always open, except on holidays; that is, there are no terms in the old-fashioned sense. For the transaction of its ordinary appellate business, however, there are three regular sessions a year, commencing on the second Mondays of January, May and October.

Ten days before the commencement of each session the clerk sets for hearing and has printed a calendar of all the cases ready for hearing during the ensuing session, setting six cases for hearing each day except upon Fridays which are reserved for the hearing of motions and cases brought before the court by some appropriate writ wherein the statutory appeal is an inadequate remedy by reason of the nature or exigency of the particular case. The court seldom sits on Saturdays, and then only to hear matters of pressing emergency. A copy of the printed calendar is immediately sent to all counsel who have cases set for hearing during the ensuing session. In this manner all counsel are advised of the day on which their cases will be heard and they may rest assured that their cases will almost certainly be heard and taken under advisement on the day set. Counsel are also fairly well advised of the time when their cases will be heard, because of the rule requiring the clerk to set cases from the several counties in order, commencing upon the first day of each session with cases coming from the county where the court sits at the capitol, and proceeding thence in succession to the next nearest county throughout the state, the hearing of cases from the several counties falling, for the most part, on about the same days of successive sessions. The departments sit alternately, each a week at a time; the purpose being to furnish opportunity for the writing of opinions by the judges of each department during the weeks it is not sitting.

The oral arguments of counsel are limited to one-half hour on each side. Extension of time, however, is allowed upon application made therefor at the beginning of the argument, if the importance of the case seems to warrant such extension. A considerable number of cases are submitted on briefs without oral argument, so that the court is nearly always able finally to take under advisement at the close of each day all the cases set for hearing on that day. The daily sessions of the court are from 10:00 a. m. to noon and 1:30 p. m. until the close of the day's work. Upon the adjournment of court each day the judges immediately go into consultation upon the cases heard and submitted during that day. A tentative decision being then reached, the case is assigned to a judge for a more critical examination and the writing of an opinion. For the writing of opinions, cases are assigned, without regard to their subject matter, in rotation

to the judges, so that each judge, other than the chief justice, has the same number of opinions to write. The chief justice is assigned half as many cases for the writing of opinions as the other judges.

Opinions Read in Both Divisions

When a judge has completed an opinion to his satisfaction, he signs it in form ready for final filing. It is then handed in turn to each of the other judges participating in the hearing, each of whom indorses thereon either his concurrence or dissent. The opinion is then handed in turn to each of the four judges of the other department for their reading and such examination as they may care to give it. This reading of the opinion by the judges of the other department is not so much for the purpose of their critical examination of the questions involved as to in some measure afford an additional check looking to the correction of erroneous expressions, either as to form or substance, that may be noticed in such reading. If all participating judges concur and no criticism is made by the other judges, the opinion is considered ready for record as the final disposition of the case. It is then merely filed with the clerk, not read or announced from the bench in the old-fashioned way, and counsel for the respective parties are notified accordingly. If there be a dissent by a judge who participated, or some criticism by a judge who did not participate, an effort is made by further consultation to harmonize the views of the judges, and reconstruct the opinion accordingly; or, if a majority of the participating judges persist in a view of the case not concurred in by the others, such view may become the final disposition of the case, so far as the department's decision is concerned; or it may be set for re-hearing *en banc*. The briefs in each case are distributed to the judges to participate in the hearing thereof, a few days prior to the day of the hearing, so that each of such judges has opportunity to become in a general way familiar with the case before argument, which opportunity is quite generally well improved.

The court sits *en banc*, all of the judges being present, for a period of about one week during each session. This is for the re-hearing of such cases as have been decided by a department and a re-hearing granted therein, and also for the hearing of cases of extraordinary importance which the court may of its own motion set for hearing *en banc*. Since each department of the court as now organized consists of five judges, litigants are afforded the opportunity of presenting their cases to a court, even in a department, of equal number of the court's original constitutional creation, the purpose of such statutory reorganization of the court being as far as possible, to have a department decision final.

It may be asked, when does the chief justice find time to write opinions in the cases assigned to him? At the close of each session each of the other judges has, during the weeks of the session he is not sitting, generally written opinions in about one-half of the cases assigned to him, thus generally finding himself at that time about even with the chief justice as to the number of opinions thereafter to be written. So it is during the vacations between sessions that the chief justice writes nearly all of his opinions, finding himself then burdened in that respect about equal with his colleagues.

System Works Well

I have often been asked by judges and lawyers of other states how this department system works. My answer has been and is that it works well in a state like ours with a greater amount of business than one court can well take care of and yet not sufficient business to warrant the establishing of intermediate appellate courts. After our fourteen years of experience with this system, I think it safe to say that the court and the bar are satisfied that it is the best system that can be devised in a state with the amount of business that we have to dispose of. So far as I am advised, the few courts of last resort of our sister states working under this system have found it workable and satisfactory. One of the advantages of the department system is that it furnishes added time for the writing of opinions, which all appellate judges must

recognize is the real labor of an appellate court.

At the risk of unduly extending this paper, I add a few words touching the court's physical surrounding and working conveniences. The court sits only at Olympia, the capitol city, in a building constructed exclusively for the housing of the court, the attorney general and the state law library. Each judge has a separate study room, with a separate room for his clerical help, adjoining the law library, from which in a moment's time he may have placed upon his table almost any law book printed in the English language. The building is constructed on the simple, artistic lines of pure Greek architecture and planned within looking to efficiency in the work of the governmental departments it houses. Our capitol commission, under whose supervision it, and other capitol buildings, was and are being constructed, has officially named it "The Temple of Justice."

Emmett N. Parker.
Olympia, Washington.

Justice for the Poor

[This study of civil litigation in relation to poor persons has been condensed by the author, Mr. John MacArthur Maguire, of the Boston Bar, from his much longer and fully documentated article entitled Poverty and Civil Litigation, which appeared in Harvard Law Review, Vol. XXXVI, No. 4. Published by permission.]

No story is sadder, and few stories are older, than that of the poor man who is prevented from enforcing his legal claims because he cannot pay court fees and costs, lawyers' charges, and the other miscellaneous expenses of even the simplest litigation. That mere poverty should impose such a disability has been a standing reproach to the American law for many years, and to the English law for several centuries. To give England her due, she has tried since as far back as the time of Magna Charta to wipe out this blot upon her civilization. But any honest Englishman who knows what his country has done in this respect will admit frankly that little permanent good was accomplished prior to 1914. Some benevolent plans failed because the means of reform were ill-chosen; others failed because of inadequate administrative machinery.[1]

Of the United States as a whole the same thing must be said at the present time. But here, with so many independent jurisdictions, we find in numerous states an entire lack of remedial measures and in the remaining states an extraordinary jumble of different provisions.

Consider first the jurisdictions without provisions of even the most primitive sort to help poor litigants. These include several densely populated states in which the problem takes its most acute form. Before the recent establishment of her small claims courts, Massachusetts belonged in this class, and she still belongs so far as claims of more than thirty-five dollars are concerned. Several other New England states have not taken this or any similar step. With such a situation in some of our oldest communities, it is no wonder that throughout the country we find states, either separate or in small groups, where civil proceedings *in forma pauperis* are unknown. An apologist for this condition is hard put to it. Chief Justice Rugg of Massachusetts perhaps made the best possible defense when he said:

"Social conditions and the practice respecting costs and the bonds required as security for appeals in this Commonwealth have made inapplicable the rule in this regard which still prevails in England."[2]

Even this leaves the reader cold. What if costs are low? There will always be litigants the level of whose finances is lower. The learned Chief Justice does not mention fees, which, in Massachusetts

[1] See Judge E. A. Parry's well-known book on The Law and the Poor, p. 184; also 47 L. J. 48-50 (1912.)

[2] Forbes *v.* Thorpe, 209 Mass. 570, 578, 95 N. E. 955 (1911). This case deals only with an equity appeal. But the argument above quoted, appears to have general application.

at least, are on the whole lower than costs. Yet it is definitely known that in Boston alone more than three hundred and eighty-three persons were between April, 1916, and July, 1922, prevented from bringing suits or actions because they could not pay the small court fees. Then as to security for costs. Although this is not required in Massachusetts from resident plaintiffs, it is required from non-resident plaintiffs. Surely, too, a law is but feebly virtuous in allowing a litigant to run up a bill of costs which he is notoriously unable to pay, and for non-payment of which he may be arrested in some jurisdictions. Better far to give reasonable exemptions in the first place. Of course nothing in the foregoing quotation from Chief Justice Rugg at all touches miscellaneous expenses or the vital matter of lawyers' fees.

Next we come to a few states which, despite a lack of statutes on the subject, have held either that they inherited as English common law[3] the older provisions for relieving pauper litigants or that exemption of the poor from costs and fees, and probably their right to free legal services also, are necessarily implied from constitutional provisions guaranteeing unbought justice to all.[4] This is something, but not nearly enough. The doctrine of adopted common law is a feeble reed to lean upon. Any state legislature may, more perhaps by accident than by design, abrogate the common law with a statute categorically requiring costs and fees. Worse still, this doctrine would necessarily saddle us with an outworn English system already tried and found wanting. With respect to the constitutional basis, it should be observed that collision between constitutional provisions may rob poor men of the lawyers' services which they must have to attain justice. For in some jurisdictions at least a lawyer assigned to act gratuitously can refuse the assignment and support his refusal by appealing to the constitutional guaranties that taxation shall be equal and that no man shall be compelled to render service or give up his property without just compensation. Such action by lawyers, and such decisions by courts, contrast sadly with the noble tradition of the early Roman bar that orators or advocates should serve without recompense, "looking to fame and influence as their reward," but they are facts not to be disregarded. Another highly practical objection to proceeding under constitutional provisions is that their general terms leave the courts relatively powerless for lack of administrative machinery.

In the other American jurisdictions statutory confusion reigns. To begin with, there is much undesirable inconsistency about the persons to whom and the stages of a case in which the exemptions apply. Quite often residents are the only beneficiaries. Yet non-residents may need help more, since they are commonly required to give security for costs. The general federal statute helps only citizens.[5] There is a special statute for the benefit of *all* seamen, irrespective of nationality.[6] But surely we mean that other poor foreigners shall have justice, and the federal courts are specially intended for this purpose. Several states repeat an old English mistake of protecting plaintiffs only, while defendants, who may be just as needy and who are dragged into litigation willy-nilly, must trust to luck or private charity. One or two require a certificate of counsel supporting the application, a restriction which became almost a prohibition in England. The tests or standards of poverty are strikingly inconsistent: ten dollars, for instance in Arkansas[7] and one hundred dollars in New York.[8] More often, there is no prescribed standard at all, and judges have ponderously to deter-

[3] California: Martin *v.* Superior Court, 176 Cal. 289 (1917); see notes in 6 CAL. L. REV. 226 (1918) and 31 HARV. L. REV. 485 (1918). California has partial *in forma pauperis* provisions.

Pennsylvania: Willis *v.* Willis, 20 Pa. Dist. 720 (1911). As a practical matter, the legal aid workers find that these inferior court cases are little recognized or followed. It has been argued with a great deal of force that Massachusetts ought to join either these states or Rhode Island (see next note). 4 MASS. L. QUART. 328, 330.

[4] Rhode Island: Spalding *v.* Bainbridge, 12 R. I. 244 (1879), and Lewis *v.* Smith, 21 R. I. 324, Atl. 542 (1899).

[5] Act of July 20, 1892, c. 209, 27 STAT. AT L. 252.

[6] Act of July 1, 1916, c. 209, 39 STAT. AT L. 313.

[7] CRAWFORD & MOSES, 1921, DIG. STAT., § 1851.

[8] 1922. GILBERT CIV. PRAC. ANN., CIV. PRAC. ACT. § 199.

mine when a man's "poor." Some laws cover appeals, some do not, some leave the point in doubt. These, of course, are details, but they are highly important and should be settled uniformly and on a liberal basis.

Now let us see what our statutes have done with regard to fees, costs, and lawyers' services. Eighteen of the states with legislation on the subject exempt poor litigants from payment of court fees, either permanently or until success in the suit furnishes money to pay. A somewhat larger number of states ease the needy of costs. This is done by absolute exemption, or by waiving the usual requirement of security, or by leaving the matter of costs to the court's discretion. In sixteen states and in the federal courts the litigant is thus benefited as to both fees and costs;[9] in two states as to fees alone;[10] in seven states as to costs alone.[11] It is worth noting that some slight moves are made toward lifting what I have called miscellaneous expenses of litigation. The federal statute exempts poor appellants from advance payment for printing records;[12] Louisiana provides for free stenography.[13]

A dozen of the states under discussion give their courts power to assign lawyers to needy suitors. The federal courts also have this power.[14] In Nebraska the public defender takes in hand for the needy those cases involving sums of one hundred dollars or less.[15] Elsewhere the provisions are vague, simply allowing assignment from the ranks of the bar in general. Here again we touch a vital point. The remedy is inadequate. For some reason or other the power of assignment is now little used. It is cramped by constitutional difficulties. It does not bring out able counsel for poor men. Yet in essence it is good, and under sound administration it has real possibilities. Statutes and rules can provide for proper choice of lawyers, particularly by forming an official instead of a merely casual connection between courts and legal aid workers. Of this, more in a later section. What we must recognize, however, is that the present American system of assignment is more a will o' the wisp than a true beacon of hope for the indigent.

Take another administrative matter: the winnowing out of sound claims from unsound ones. If this is not done at all, the courts will be clogged. If the test is made too strict, the poor are likely to lose most of the benefits which the legislature meant them to have. English experience is eloquent on both these points. And in America there is evidence that poor persons' procedure has been badly abused where proper initial scrutiny of cases was lacking. But here the existing American statutes hardly scratch the surface. They usually leave the judges themselves to make any preliminary inquiries, which means either that the inquiries are superficial or that the court is burdened with a duty stealing much time from true judicial work. Particularly in such administrative aspects the best of our procedures will hardly bear comparison with those of foreign countries.

The neglect to provide help for needy litigants and the haphazard nature of such help as has been given are striking features of the American situation. Neglect is shown most strongly by the twenty-odd states with no *in forma pauperis* practice; in a little or lesser degree by three or four states depending wholly or partly upon the general wording of constitutional provisions or sketchy adaptations of English procedure. Haphazard conditions are sufficiently shown in the immediately preceding paragraphs. But for a particularly striking example of hit-or-miss legislation we can turn to Congress. In 1892 the main federal statute covering poor men's suits was enacted. For some years there was controversy in the

[9] The states are: Colorado, Illinois, Indiana, Kentucky, Louisiana, Mississippi, Missouri, Montana, New Jersey, New Mexico, New York, North Carolina, Texas, Utah, Virginia, West Virginia.

[10] Arkansas and California.

[11] Arizona, Georgia, Kansas, Michigan, Oklahoma, Tennessee (it may be, however, that the Oklahoma and Tennessee acts use the term "costs" to cover fees as well; if so, these states should be in the note 9 list), and Wisconsin.

[12] Act of July 20, 1892, c. 209, 27 STAT. AT L. 252, as amended by Act of June 25, 1910, c. 435, 36 STAT. AT L. 866; BARNES, FED. CODE, § 1367. See also Virginia; 1919, CODE, § 3486.

[13] 1915, MARR'S ANN. REV. STAT., § 1012. See also Arkansas: 1921, CRAWFORD & MOSES, DIG. STAT., §§ 2250, 3282.

[14] See references in n. 12, *supra*.

[15] 1922, Comp. Stat., secs. 10105, 10106. See also 1921 Nevada Stat., c. 138.

inferior United States Courts as to whether this act extended to appellate proceedings. The Supreme Court ultimately decided that it did not. The defect was removed in 1910 by amendment.[16] In 1916 Congress passed the act for the benefit of poor seamen which has already been referred to. Despite experience with the law of 1892, the seamen's act did not cover appeals. Only when the Supreme Court had settled this point was proper amendment made.[17] Under each of these statutes, then, individuals were needlessly sacrificed upon the altar of legal progress. Sometimes, even when statutes are poorly drawn or entirely lacking, brilliant advocacy or particularly vigorous court action has prevented such sacrifices.[18] The poor never have been and never will be without sympathy and help from individual judges and members of the bar. But it is hard to discern in any of our existing laws even the foundations of a comprehensive and effective plan for bringing justice within the reach of all. We do find such a plan actually developing and operating in England. Although still imperfect, it seems fundamentally sound, and is being brought nearer practical perfection by intelligent amendments. We should lose little and gain much if we stripped away most of our present fragmentary *in forma pauperis* law and set sail under new statutes cut on the pattern of the English rules.

The New English Rules

The English rules regulating poor persons' proceedings, as promulgated by the High Court of Judicature in 1914 and as subsequently amended in the light of experience, present five specific outstanding features. I shall follow up a statement of these features with some brief general comments.[19]

a. *The Clearing House for Poor Men's Causes.* The rules have established a Poor Persons' Department in the Royal Courts of Justice at London, with branches in the District Registries. These offices are the administration centers. To them applications for relief are made, and by them investigations, assignments of lawyers, money payments from client to solicitor, and other administrative details are controlled. Thus poor people are not left in doubt as to where they shall seek relief. Accessible and well-known clearing houses are essential to the success of this or any similar remedial system.

b. *The Assignment of Lawyers.* History has shown that an *in forma pauperis* system most quickly breaks down at the point where it tries to secure for the poor litigant the services of a lawyer who, by hypothesis, cannot expect to be adequately compensated for his time and effort. The provision of attorneys' services is a condition precedent to success, but to make this provision in practice is a perplexing and inherently difficult problem.

Theoretically, the power of a court to act on its own initiative and call upon any member of the bar, plus the lawyer's ethical and professional obligation to respond, would seem to afford a complete solution. Practically, except in small communities and in rare cases elsewhere, it is no answer at all.

When the need is to secure lawyers for hundreds and thousands of indigent suitors the court faces a task it is ill-equipped to perform. Hit-or-miss assignments, made without regard to the ability or willingness of the particular lawyer to serve, are not satisfactory to anybody. A routine plan of rotating assignments, as by following the alphabetical order of attorneys' names, is hardly better; it is arbitrary and unintelligent.

To begin with, the English plan lifts the burden of making assignments off the court and entrusts the responsibility to the Poor Persons' Department with its headquarters in London and its branches in every district. But it seeks to avoid the inherent evils of a compulsory assignment system. It recognizes the fact that the average lawyer works just as hard for his living as the next man. He simply cannot

[16] Act of June 25, 1910, c. 435, 36 STAT. AT L. 866.

[17] Ex parte Abdu, 247 U. S. 27 (1918); Act of July 1, 1918, c. 113, 40 STAT. AT L. 683.

[18] Perhaps the most striking example is Martin *v.* Superior Court, 176 Cal. 289, 168 Pac. 135 (1917).

[19] For the rules from 1914 to 1916, see Adrian H. Hassard-Short on the Practice in "Poor Persons" Cases (Stevens & Haynes, London, 1916). For later changes see ANNUAL PRACTICE, Order XVI, part IV.

afford to have a large burden of charity work arbitrarily thrust upon him. If it is thrust upon him he faces the dilemma of neglecting those clients from whom he earns his living or of neglecting his assigned cases. A lawyer owes a duty to his profession, but he also owes a duty to his wife and children. Any plan of doing justice to the poor by doing injustice to the bar will soon collapse. So the present assignments in England are voluntary from first to last. The Poor Persons' Department at London has built up for its use and the use of the District Registries two lists of lawyers. The first list contains the names of barristers and solicitors who have volunteered to inquire into and report upon *applications* for admission to sue as poor persons; the second contains the names of those who have volunteered to *conduct the cases* of poor persons whose applications have been favorably passed upon. But whether or not a lawyer has put his name down on the lists, the Department may intrust to him the investigation or the conduct of a case; conversely, even if he has his name on either list or both, he may decline any particular assignment offered him.[20]

The Poor Persons' Department has had difficulty in maintaining large enough lists. The war, of course, complicated the situation. But since the war, legal publications have carried several appeals for volunteers. Time and custom may correct this difficulty, or the difficulty may grow and prove the task too great to be coped with by even the best regulated voluntary assignments. The doubt here implied is not predicated on any pessimistic view of the legal profession's generosity but on the the multitude of people who may need to be served.

c. *Investigations of and Reports on Applications.* Under the English system, when an applicant fills out and files the prescribed printed form, an investigation follows covering (1) the applicant's financial status and (2) the practical merits of his claim. At first these investigations were not invariably models of thoroughness. A single solicitor assumed, for instance, to inquire into and report upon 523 cases in a single year.[21] But amendment of the rules has fixed clearer standards of care. Unquestionably the investigations do protect the courts. Out of more than 28,000 applications received down to the end of October, 1922, over half were refused. It has been authoritatively stated that the character of the cases progressively improved.

This matter of preliminary scrutiny is most important. It may span the gap between failure and success. As conducted in England, it means that normally nothing except the actual trial of approved cases comes before a judge. Under the rules "the Court or Judge" must pass on each report, but the practice is to have a Master or Registrar represent the court for this purpose. It seems scarcely necessary to emphasize the wisdom of letting judges give their time as completely as possible to strictly judicial work.

While the method of inquiry by assigned volunteer counsel has proved workable, certain English critics argue that specialists could conduct the investigations with greater speed and efficiency and a saving of much valuable time to the volunteers. Certainly such experts as the legal aid attorneys of the United States would excel ordinary practitioners if used for this purpose.

Obviously the rules had to lay down a standard of poverty. An applicant is "poor" if (1) not worth more than fifty pounds (certain property excluded) and (2) not in receipt of a usual income exceeding two pounds a week. Under special circumstances a judge may increase either of or both these maxima, the first not beyond one hundred pounds and the second not beyond four pounds. It would seem possibly a trifle wiser to put no top limit on the judge's discretion, at least in America, where the tendency is to make this kind of regulation by statute and not by court rule which may easily be changed.

d. *Conduct of Cases.* After an application has been approved, the English administrative officers assign to the applicant

[20] But once a lawyer takes hold, he may not drop a case without cause.

[21] 54 L. J. 474 (1919).

a solicitor and counsel willing to act in the conduct of his case. Here there has been some complaint of inefficient service by assigned lawyers. Plainly the solicitor who in a single year accepted 401 cases for conduct could not become very familiar with the troubles of each poor client.[22] Nowadays this sort of thing is not likely to happen, and each conducting solicitor must report annually on every case which he accepts.

The applicant admitted to the English courts as a poor person is, of course, freed from personal responsibility for fees, and as a general rule from liability for costs. In addition he need not dig into his pocket to meet lawyers' charges. But suppose he is a successful plaintiff and comes out of the litigation with more than he had at the start. How about fees and the lawyers then? There appears to be no liability for fees. The poor man's solicitor may have certain limited compensation on court order, but his barrister is entitled to no compensation. This latter rule seems somewhat harsh, unless it is based upon the very exacting traditions of the English bar. The world of clients is not divided into persons who can pay in full and persons who can pay nothing. There is a large intermediate class of persons who can pay something and who should do so, particularly when the outcome of the case is a substantial money recovery. It is obviously wise to award any such fees under court supervision (following the analogy of the control over fees exercised by our industrial accident commissions) in order to preclude any overreaching or suspicion of overreaching.

e. *Discretionary Characteristics of the Rules.* The English now very properly recognize that in a scheme of this kind simplicity and flexibility are prime essentials. The best rules are broad ones allowing reasonable exercise of discretion by the administrative and judicial officers concerned. The only provision which might be deemed rigid is the one laying down the standards of poverty, and even this seems a broad enough rule of thumb. No limitation of nationality or domicil is imposed to narrow the class of those who may apply for admission as poor persons; application may be made at any time; the order thereon is discretionary, may be revoked, and gives no basis for an appeal without leave; leave of court is also required for carrying the merits of a case to the Court of appeal. Thus, while poor persons *may* have most liberal treatment, they must prove that they deserve it. This seems to be the correct principle. Every plan of this character must depend for success upon the sympathetic firmness of those who manipulate it.

f. *General Comments.* An admitted weakness of the new English system is the lack of a fund from which advances may be made for meeting in the first instance the miscellaneous expenses of litigation. This is a serious matter, for it would not be reasonable, and might not be ethical, to expect the most charitably inclined solicitor to advance his poor client's cash out of pocket on the gambling chance of success in litigation. Matrimonial causes bring out the point emphatically. In them, the applicant must make an advance deposit of five or fifteen pounds (depending on the nature of the case) and must add further sums if the original deposit proves inadequate. Only too often such further sums become necessary, as America and the British Colonies are favorite resorts of matrimonial offenders. Service in these distant places costs from five to ten pounds, and obtaining evidence from twenty to twenty-five pounds.

When the rules were first put in operation, it was with full expectation that a fund to assist poor litigants would be provided. Ingenious suggestions were made as to the sources from which it might be drawn—as, for example, treasure trove, escheats, and unclaimed funds in the Supreme Court. But the unprecedented expense of the great war put this problem temporarily beyond hope of solution. Clauses referring to the fund remained in the rules for some years as melancholy monuments to what might have been. These clauses have now been stricken out.

Another apparent defect of the English rules is that they stop short at the

[22] 54 L. J. 474 (1919).

threshold of the County Courts, which are the tribunals handling the bulk of small litigation in England. As the Attorney-General explained eight or nine years ago when answering a question in the House of Commons, it is difficult to differentiate between County Court litigants in the matter of poverty. Surely, though, a summary system of investigation could be devised and arrangements made to care for that deeply submerged fraction of the population whose poverty closes even these inexpensive tribunals to them. As things stand now, it is hard indeed for a really poor man to prosecute a small personal injury claim. If he starts in the High Court and gets a poor person's order there, his case is likely to be remitted to the County Court, where he loses this advantage. And so in the United States, it is submitted that even small claims courts should have *in forma pauperis* rules and powers.

Thus far, the English rules have given principal proof of their utility by relieving a divorce situation which was in its way as shocking as the divorce conditions of even our most notorious States. Since so many divorce suits are handled under the rules, and so few cases of other types, some critics feel that the plan must be working imperfectly and ought to have further revision.

The records for England and Wales from 1914 to 1921 inclusive follow:

	No. of Ap'cat'ns	Rel'f Gr't'd	Pct. Rel'f Gr't'd
Court of Appeal....	113	24	21%
Chancery Division..	1,319	155	12%
King's Bench Division	2,436	549	23%
Probate, Divorce and Admiralty Div....	22,967	12,223	53%

Although the number of applications in the Divorce Division seems disproportionate it must be remembered that prior to 1914 divorce was, to all intents and purposes, flatly denied to the poor. Hence the present flood may be nothing more than a natural accumulation of cases in which (as the high percentage of matters where relief was granted would indicate) long overdue justice is now being done.

Suggestions for the United States

With both historical and contemporary experience to guide us, we in the United States ought to be able to do infinitely better than we have done thus far in making our civil courts accessible to all persons irrespective of poverty. After clearing the ground by repealing the patchwork statutes now on their books, the legislatures in the several states should be asked to enact comprehensive laws laying down the broad controlling principles for an *in forma pauperis* system and conferring on the courts adequate power to regulate the procedure through rules.

Our states vary so much in size and in the structure of their court organization that no one model act would be suitable to all the different jurisdictions. While uniformity as to the underlying principles is eminently to be desired, there will inevitably be various modes of application. All that can be done here is to point out what features are essential if the relief is to be effective:

1. Broad legislative standards, under which the courts may make more detailed rules, must define who is entitled to relief as a poor person.

2. Definite forms for applications by poor persons should end the fruitless haggling over this initial step. It is much wiser to let the courts regulate these forms instead of crystallizing them by statute.

3. A definite method of investigation must be provided to determine (*a*) whether the applicant is a poor person as defined, and (*b*) whether his complaint or defense seems of sufficient merit and validity to entitle him to this special help, This investigation should be conducted by, or under the supervision of, an administrative department, or auxiliary agency of the court.

4. In approved cases, applicants should not become liable to furnish security for or pay costs unless improvement of their financial circumstances removes them from the class of "poor persons."

5. In approved cases, fees which the state charges in cash or taxes during the progress of the litigation (entry fees, trial fees, jury fees, etc.) should be remitted or

waived, subject to complete or partial reinstatement if the ultimate situation warrants. This includes fees payable to such ministerial officers as sheriffs. Where such an officer is salaried and his fees go to the county treasurer, this presents no difficulty. Where the officer is dependent on his fees, the county must reimburse him unless the court, at the termination of the case, can properly charge and collect this item. Experience in New York with the city marshals who collect executions proves that if the officer is obliged to work for nothing or to gamble on a recovery, his service will be unsatisfactory.[23]

6. In those cases and in those courts where the services of counsel are necessary, provision must be made to secure lawyers for the litigants. Determination as to the need for an attorney should be made part of the preliminary investigator's report. Small claims courts will do much to prevent excessive pressure on the bar or legal aid organizations. Between January 1, 1921, and June 30, 1922, the Boston Legal Aid Society has been able to send nearly 300 applicants to fend for themselves in the Massachusetts small claims sessions.

7. Some reasonable provision should prevent duly qualified litigants from having their progress blocked by inability to pay witness fees, and, in rare cases, stenographers' and printers' bills.

8. The statute should cover all stages of all civil proceedings in all civil courts, and should provide specifically for proceedings by representative parties such as next friends, guardians, administrators, and trustees.

This program is not so formidable as it sounds. Within the past decade we have been attacking the evil effects of poverty in civil litigation, and through modern municipal courts, small claims courts, conciliation tribunals, domestic relation courts, and industrial accident commissions we have enormously reduced the number of persons who would be obliged to apply for relief *in forma pauperis*. This reduction can be carried much further, but there is now and always will be a definite class of persons and cases for whom this relief is the only possible door to justice.

The large experience of legal aid organizations in this field affords a basis for a conjecture which gives reasonable assurance that a *proper* procedure *in forma pauperis* would not throw an intolerable burden on the administration of justice. For each 100 of population there are, on the average, about two persons who could qualify as "poor persons" and who would have any litigation in a given year. In a city of half a million inhabitants that would mean 10,000 possible applicants for relief. In a jurisdiction equipped with the modern court machinery and organization referred to by the preceding paragraph, the number would at once be reduced by at least 5,000. The preliminary investigation would further reduce the application to 3,000 or 4,000 approved cases, and the matters requiring attorney's services would again be substantially fewer. Double this estimate, and even so the task is easily within the power of organized society.

The great problem in England has been to secure the necessary lawyers' services. In the United States an efficient, inexpensive, and satisfactory method of meeting this difficulty has been known for years. Our thirty or more legal aid organizations in all our larger cities, if encouraged to develop and extend themselves, could, in co-operation with the assigned counsel system in smaller communities, provide a complete solution. It is not generally recognized how nearly equipped we are to put such a plan into operation. The American Bar Association, having provided its own standing Committee on Legal Aid Work, has called on all state and local bar associations to do likewise.[24] When this is accomplished there will exist a definite chain of bar committees through whom, in the smaller cities and towns, the assignments of cases may be made. In the larger cities, where the chief burden will

[23] 45TH ANN. REP. N. Y. LEG. AID SOC. (1920), 39-42; 44 *id.* (1919), 29.

[24] 47 AM. BAR. ASSN. REPORTS, 96 (1922).

fall, are the steadily growing legal aid societies and bureaus.

These legal aid organizations, if linked up in some co-operative way with the administration of justice, could make the preliminary investigations and, so far as applications were approved, conduct the actual proceedings. Through their corps of attorneys, numbering nearly two hundred, they are now performing these very functions. No legal aid organization will accept a case unless (a) the applicant is a poor person and (b) his case is meritorious. They have developed, and are perfecting, a technique for this investigation.

The Philadelphia Legal Aid Bureau, supported by the city, affords a concrete illustration. In 1921 it received 13,404 applications. Of these 1,863 were rejected after the preliminary investigation, and 754 cases were dropped because the matters were without merit or not cognizable by law. It requires no stretch of the imagination to see how easily such an organization could be utilized for all *in forma pauperis* proceedings within its jurisdiction.

The operations of this Bureau also point another moral. As Pennsylvania has no *in forma pauperis* statute, and the so-called common law practice inherited from England is little used, the Bureau must now pay court charges. The Philadelphia Municipal Court fees (exclusive of jury fees), for example, are $6.00. We have, therefore, the spectacle of one public institution, supported by taxpayers, paying its money to another public institution, also supported by taxpayers. In such a situation, a statute waiving fees for the sake of indigent suitors is not a burden on the state. It is simple common sense. Instances like this make one marvel at the fact that in America we have done so much to solve the inherently difficult part of the problem and yet have bungled so badly the much easier part.

The suggestion that the state or county treasury should financially assist poor persons to summon their witnesses and meet other cash expenses of litigation may not be feasible at this time. Although the legal aid experience indicates that only a small revolving fund would be required, yet the underlying conception of direct state aid in civil cases involves a step which many state legislatures would refuse to take. It is possible that such action might be held an unconstitutional devotion of public funds to private uses. This difficulty can be surmounted only when public opinion reaches the conclusion that the state, in carrying out its supreme task of securing justice to its citizens, must do whatever is needful to guarantee equality before the law.

Toward this conclusion the public conscience slowly moves. In criminal cases the evil caused by allowing poverty to disturb the equilibrium of the scales of justice is so dramatic, so readily understandable by the average man, that already we find laws providing indigent accused persons with counsel, paid out of the county treasury, and with funds for summoning witnesses and conducting their defense. Yet only a hundred years ago poor men, though acquitted, were kept in English jails for years because they could not pay the jailer's fees and the county would not bear the expense.[25]

The Chief Justice of the United States, speaking at the rededication of the original Supreme Court building in Philadelphia on May 2, 1922, said: "Much remains to be done in cheapening litigation in the Federal Courts by reducing costs or transferring them to the public treasury."[26] Much remains to be done in the state courts as well. Consideration and criticism of the *in forma pauperis* plan should begin in the bar associations. There has heretofore been a lack of material on which a helpful discussion could be based, but the matter is now ripe for hearing.

John MacArthur Maguire.

Boston, Massachusetts.

[25] G. M. TREVELYAN, BRITISH HISTORY IN THE NINETEENTH CENTURY, 32.
[26] 8 JOUR. AM. BAR ASSN. 335.

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